

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 36

CARL C. INMAN, PETITIONER,

vs.

BALTIMORE & OHIO RAILROAD CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OHIO

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[fol. 1]

[File endorsement omitted]

**IN THE COURT OF COMMON PLEAS OF
SUMMIT COUNTY, OHIO**

CARL C. INMAN, 60 Broad Street, Akron, Ohio, Plaintiff,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Metropolitan
Building, Akron 8, Ohio, Defendant.

PETITION—Filed July 1, 1954

1. Comes now the plaintiff and avers that the defendant is and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of law, owning, maintaining and operating various lines of steam railroad in the State of Ohio and elsewhere throughout the United States, one of which lines extends into and through the City of Akron, Summit County, Ohio.

2. Plaintiff further avers that at the time hereinafter complained of, both he and the defendant were engaged in interstate commerce and this action is brought under the Act of April 22, 1908, and the amendments thereto, commonly known as the Federal Employers' Liability Act.

3. Plaintiff further avers that Tallmadge Avenue is and at all times hereinafter mentioned was, a duly dedicated public street and thoroughfare in the City of Akron, Ohio, extending in a general easterly and westerly direction; that Home Avenue is and at all times hereinafter mentioned was, a duly dedicated public street and thoroughfare in the City of Akron, Ohio, extending in a general north-easterly and southwesterly direction, intersecting said Tallmadge Avenue.

4. Plaintiff further avers that at the time herein referred to, and for a long time prior thereto, the railroad tracks of the defendant extended in a diagonal direction, [fol. 2] at grade, across said intersection from the north

to the southeast corners thereof; that said intersection and crossing was extensively used by the travelling public at all hours of the day and night; that defendant operated trains on said tracks and over said crossing at frequent intervals; that said intersection was so constructed that vehicles proceeding in a northeasterly direction on Home Avenue could make a lefthand turn onto Tallmadge Avenue, without crossing said railroad tracks, at a point in said intersection immediately west of the railroad tracks of the defendant; that said crossing was unequipped with gates and was attended by a watchman or flagman.

5. Complaining of the defendant, plaintiff avers that on or about the 2nd day of January, 1952, at about 12:10 o'clock in the night season, while he was employed as a crossing flagman for the defendant, it became and was his duty as such flagman to signal and warn the travelling public of the presence of one of defendant's trains travelling over the tracks of said crossing at said intersection, and in the course of his said duties, he was required to be and was standing on Tallmadge Avenue, at a point where said street was intersected by Home Avenue, just west of the tracks of the defendant, when he was suddenly and violently struck by an automobile being driven in a northeasterly direction on Home Avenue and making a lefthand turn into Tallmadge Avenue at said intersection, and as a consequence whereof, plaintiff was seriously injured as hereinafter described.

6. Plaintiff further avers that said crossing is particularly hazardous to flagmen of the defendant company, who are required to be on duty thereon, at the place where plaintiff was struck by said vehicle, for the reason that during the time trains are passing over said crossing, the flagman is required to keep a lookout for other trains of the defendant approaching said crossing and while so engaged, it is impossible for the flagman to watch for or observe vehicles entering the intersection of Tallmadge Avenue from Home Avenue at the point where plaintiff was struck, as aforesaid; that said crossing was unequipped [fol. 3] with a signal located in such a place at said crossing, that the flagman, while on duty, could be advised of

the approach of other trains at said crossing and watch for traffic proceeding from Home Avenue into said intersection of Tallmadge Avenue, at the point where plaintiff was struck, as aforesaid; that all of these facts and conditions were well known to said defendant.

7. Plaintiff further avers that at the time complained of, the defendant negligently and carelessly ordered and directed plaintiff to perform his duties as a flagman at said crossing, when it was impossible for him to observe vehicles entering said intersection from Home Avenue and without taking any measures to prevent him from being struck, as aforesaid; and negligently and carelessly failed to place automatic gates on Home Avenue at its intersection with Tallmadge Avenue on the westerly side of said railroad tracks, so as to prevent vehicles from entering said intersection while plaintiff was on duty as a flagman at said intersection, as aforesaid; and negligently and carelessly failed to place another employee at said crossing to watch for other trains approaching said crossing, while plaintiff was on duty flagging; to the end that plaintiff could keep a lookout and watch for traffic proceeding from Home Avenue into said intersection, and particularly the vehicle that struck plaintiff as aforesaid; and negligently failed to provide plaintiff with a safe place to work.

8. Plaintiff further avers that as a direct and proximate result of the negligence of the defendant, as herein set forth, he was violently struck by said automobile and he sustained numerous bruises and contusions on various parts of his body. He sustained a severe blow to his head, rendering him unconscious. He sustained numerous bruises on the right side of his face and head. He suffered a fracture of the tibia of his left leg. He suffered a fracture of the fibula of his left leg. He suffered a depressed fracture of the tibial plateau of his right leg. He suffered a severe shock to his nervous system; that as a result of the fracture of his left leg, it was necessary for him to undergo a major [fol. 4] surgical operation for the open reduction of the fractures of the left leg; that his left leg was put into a cast and remained therein for a period of approximately 131 days; that by reason of the fracture of the right leg,

his right leg was placed in traction, and thereafter plaintiff was required to wear a metal brace on his right leg, for a period of approximately 16 months; that said brace extended from the sole of his shoe to his waist; that following said injuries, plaintiff was confined in hospitals by reason thereof, for a period of approximately 97 days; that during this time, he was unable to walk; that thereafter, for a period of approximately one year, he needed the aid of crutches in walking; that the fractures to his legs were of such a nature, that he also suffered a severe damage and injury to the surrounding muscles and ligaments; that as a result thereof, the regions about said fractures became badly swollen, discolored and very painful to the touch; that to a lesser degree, this soreness and stiffness has continued to the present time; that up to the present date, the walking of any appreciable distance, causes him considerable discomfort; that he suffers from loss of circulation in his legs; that said injuries caused him excruciating pain and mental anguish and that they are permanent in nature; that by reason of said injuries, plaintiff has been permanently incapacitated from performing any work or labor, all to his damage in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand Dollars (\$100,000.00), together with his costs herein expended.

Ray J. McGowan, Attorney for Plaintiff.

[fol. 5] *Duly sworn to by Carl C. Inman, jurat omitted in printing.*

PRAECIPE

To the Clerk:

Issue summons for service on the defendant, by serving the Division Passenger Agent, Metropolitan Building, Akron, Ohio. Endorse said summons: "Action for money, amount claimed, One Hundred Thousand Dollars (\$100,-

000.00), for which judgment will be taken, if the defendant fails to appear or answer."

Ray J. McGowan, Attorney for Plaintiff.

Summons issued July 1, 1954.

[fol. 6] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS

[Title omitted]

MOTION OF DEFENDANT TO STRIKE PORTIONS OF PETITION,
Etc.—Filed August 13, 1954

The defendant moves:

- (1) To strike from the petition paragraph numbered 6.
- (2) If subdivision (1) be denied, then to strike from paragraph numbered 6 the portion commencing with the word "Plaintiff", and ending with the word "aforesaid;" in the ninth line of said paragraph numbered 6.
- (3) If subdivision (1) be denied, then to strike from said paragraph numbered 6 all portions after the word "aforesaid;" in the ninth line of said paragraph numbered 6.
- (4) To strike from paragraph numbered 7 the words "and negligently failed to provide plaintiff with a safe place to work."
- (5) If subdivision (4) be denied, then to require the plaintiff to set forth the respect or respects in which the defendant "negligently failed to provide plaintiff with a safe place to work."

Wise, Roetzel, Maxon, Kelly & Andress, 1110 First National Tower, Akron 8, Ohio, Attorneys for defendant.

Copy of foregoing Motion and Attached Brief mailed to Ray J. McGowan, attorney for plaintiff, this 12th day of August, 1954.

C. G. Roetzel, of counsel.

BRIEF

The action of plaintiff to recover damages from his employer, the defendant, is governed by the *Federal Employers Liability Act*, 45 USCA Sec. 51. The basis of liability, if any, is negligence or failure of the defendant to exercise ordinary care. In paragraph 6 of the petition plaintiff states that the crossing at which he was acting as a flagman at the time of his injuries "is particularly hazardous to flagmen of the defendant company", and pleads operative facts which are claimed to show such hazardous condition. Such allegations have no proper place in a petition based upon ordinary negligence. This is particularly true because in paragraph 7 plaintiff pleads operative facts alleged to be negligent. If such facts are proven at the trial and are shown to be negligent and a proximate cause of the plaintiff's injuries plaintiff will be entitled to recover. The allegations of paragraph 6 which the defendant seeks to have stricken are not alleged to be negligent acts and are unnecessary to the pleading of a cause of action and, as already stated, are improper.

In the last clause of paragraph 7 plaintiff states that the defendant "negligently failed to provide plaintiff with a safe place to work." Under the Federal Employers Liability Act the Courts have uniformly held that the duty of the defendant is confined to the exercise of ordinary care to furnish employees with a reasonably safe place to work. There is no duty to furnish a safe place to work. See *Kay v. Penna. R. Co.* (Court of Appeals, Ohio), 102 NE 855. The allegation of negligence in failing to furnish a safe place to work should be stricken. If this branch of the motion is denied, plaintiff should be required to state the respect or respects in which the defendant failed to exercise ordinary care in furnishing the plaintiff a reasonably safe place to work.

Respectfully submitted,

Wise, Roetzel, Maxon, Kelly & Andress, Attorneys
for defendant.

[fol. 10]

IN THE COURT OF COMMON PLEAS

CARL C. INMAN, Plaintiff,

vs.

BALTIMORE & OHIO RAILROAD Co., Defendant.

FINDING ON MOTION OF DEFENDANT—
September 14, 1955

Harvey, J.:

This cause is before the Court upon a Motion.

The Court upon consideration of the Motion is of the opinion that the motion should be overruled upon the first ground and upon the second ground, but should be sustained upon the third ground.

The motion should be sustained upon the fourth ground to strike the language mentioned in subdivision four.

Apparently the pleader in paragraph seven has attempted to allege all matters which he claims constitute the negligence of the defendant in failing to maintain a place safe to work.

Therefore, the language asking it to be stricken is merely a catch-all, and a legal conclusion rather than operative facts. If, however, there are additional allegations that the plaintiff wishes to insert, then he may make the allegation more definite and certain, and that would pass upon the fifth division of this motion. If he does not desire to add anything further to the language to be stricken under the fourth subdivision of this motion, then this Petition may be amended by obliteration without reverification.

Journal Entry may be prepared.

[fol. 11]

[File endorsement omitted]

IN THE COURT OF COMMON PLEAS

CARL C. INMAN, Plaintiff,

vs.

BALTIMORE & OHIO RAILROAD Co., Defendant.

JOURNAL ENTRY ON DEFENDANT'S MOTION—
September 19, 1955

This cause came on to be heard on the motion of the defendant and upon due consideration thereof, the Court hereby overrules said motion as to grounds No. 1 and No. 2, and sustains said motion as to grounds No. 3 and No. 4.

It is further ordered that said matters ordered stricken herein be done so by obliteration without refileing or without reverification of said petition, and said defendant is hereby given leave until October 1, 1955 to plead herein.

Exceptions are hereby granted to both plaintiff and defendant.

Frank H. Harvey, Judge

Approved:

Ray McGowan, Attorney for Plaintiff.

Wise, Rootzel, Maxon, Kelly & Andress, Attorneys for Defendant.

[fol. 12]

IN THE COURT OF COMMON PLEAS

[Title omitted]

ANSWER TO PETITION AS AMENDED—
Filed September 29, 1955

1. Defendant, for answer to the petition as amended, admits the allegations of paragraphs numbered 1, 2 and 3.

2. For answer to paragraph numbered 4 of the petition, defendant admits that at all times alleged in the petition the defendant owned and maintained railroad tracks which extended at grade across the intersection of said Tallmadge Avenue and Home Avenue; that the defendant operated trains on said tracks and over said crossing; that said crossing was not equipped with gates and was attended by a watchman or flagman.

3. For answer to paragraph numbered 5, defendant admits on information and belief that on or about the 2nd day of January, 1952 at about 12:10 AM plaintiff while on duty as a crossing flagman at the aforesaid crossing was struck by an automobile and sustained some personal injuries.

4. The allegations of paragraphs numbered 6 and 7 are denied.

5. For answer to paragraph numbered 8, defendant admits on information and belief that plaintiff sustained some injuries as result of being struck by said automobile, but denies that same were of the nature and character alleged in the petition.

[fol. 13] 6. Except as hereinbefore admitted or qualified the defendant denies each and every allegation contained in said petition as amended, and prays that said petition be dismissed.

Wise, Rootzel, Maxon, Kelly & Andress, 1110 First
National Tower, Akron 8, Ohio, Attorneys for de-
fendant.

Duly sworn to by C. G. Rootzel, jurat omitted in printing.

[File endorsement omitted]

[fols. 16-17] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS

Case No. 494077

State of Ohio,
County of Summit, ss.:

CARL C. INJAN, Plaintiff,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

APPEARANCES:

Ray McGowan, Rosser Jones, Attorneys at Law, Akron,
Ohio, on behalf of the Plaintiff.

C. G. Roetzel, Richard Gaster, Attorneys at Law, Akron,
Ohio, on behalf of the Defendant.

BILL OF EXCEPTIONS—September 10, 1956

Be It Remembered That at the trial of the above entitled cause in the Court of Common Pleas, Summit County, Ohio, beginning on the 10th day of September, 1956, and continuing thereafter as hereinafter noted, before the Hon. Claude V. D. Emmons, and a jury of 12 members: the above appearances having been made the following proceedings were had:

(Thereupon a jury was impaneled.)

The Court: Statements.

(Thereupon counsel presented opening statements.)

[fol. 18] The Court: Mark the Map as Joint Exhibit A.

(Joint Exhibit A was marked.)

The Court: Call your first witness.

Thereupon in order to maintain the issues on his part, the Plaintiff presented himself as his own first witness.

CARL C. INMAN who, being first duly sworn, testified as follows:

Direct examination.

By Mr. McGowan:

Q. You'll have to speak up loud so everybody can hear you.

A. All right.

Q. Will you tell the Court and Jury your name?

A. Carl C. Inman.

Q. Where do you live?

A. 60 Broad Street, Akron 5.

Q. What is your age at the present time?

A. I was 71 last October the 20th, I'll be 72 this October.

Q. 72 on this next coming October 20th?

A. Yes sir.

Q. How long have you lived in Akron?

A. Since 1901.

Q. How long have you lived at your present address?

A. Three years, the 27th of last June.

Q. And where were you living on January 2nd, 1952, at the time of this occurrence?

A. 261 Spicer.

Q. Now then you were employed, I believe by the B & O Railroad Company in January of 1952?

A. Right.

Q. What was the nature of your employment?

A. Crossing watchman.

Q. And how long had you been employed as a crossing watchman for the B & O Railroad Company?

A. Since 1945.

[fol. 19] Q. And had you always been employed at the Bettes Corners intersection?

A. All except the first two months I think it was, I was at Second Avenue, between the Mohawk and the Goodyear there.

Q. And will you tell the jury and the Court what your duties were as a crossing watchman for the B & O Railroad Company in January of 1952?

A. Yes sir, flagging traffic so they wouldn't be on the track when the train went through.

Q. Now then what were your wages, earnings, from the B & O Railroad Company in January of 1952, how much had you earned per year up to that time?

A. I think it was \$2800.00.

Q. What were your hours of duty?

A. From 11:00 P.M. to 7:00 A.M.

Q. And had you been on that shift for sometime before this occurrence?

A. I had.

Q. For how long a period of time had you been on that shift?

A. I'd say three years.

Q. Now while you were not flagging where were you located in your work?

A. When I was not flagging?

Q. Yes, at the time you were not actually out on the street flagging?

A. In the watchman's shanty.

Q. And where was the watchman's shanty located?

A. On the east side of the tracks.

Q. Was it located north or south of Tallmadge Avenue?

A. South.

Q. And how far south of Tallmadge was it located, approximately?

A. Where are you referring to on Tallmadge Avenue, [fol. 20] the center or the edge of the street, or side?

Q. Well, say from the south edge of Tallmadge Avenue?

A. I'd say twenty to twenty-five feet.

Q. Now what was your condition of health in January, the first part of January before this occurrence?

A. I had no trouble, no sickness or nothing, I had good health.

Q. Had you worked steadily?

A. Yes sir.

Q. During the time you were a watchman for the Company?

A. Yes sir.

Q. Did you have any trouble with either one of your legs before that time?

A. I did not.

Q. And during—how many times in a shift would you be required approximately to leave your shanty to go out and flag for trains that went either direction on that crossing?

A. That could happen some nights there would be quite a number and other nights there wouldn't be so many.

Q. These trains now that we'll say were going east, in railroad parlance, I believe that's the eastbound?

A. Yes sir.

Q. Where would some of those trains originate?

A. Chicago.

Q. Illinois?

A. Yes sir.

Q. And where would they be destined for?

A. New Castle, Pennsylvania, or Pittsburgh, Pennsylvania.

Q. And the trains that were traveling east or in a southerly direction, coming from the east going west, where would some of those trains originate?

A. I would say Pittsburgh, Pennsylvania; and New Castle, Pennsylvania.

[fol. 21] Q. What would the various destinations of some of those trains be?

A. Willard, Ohio, and Chicago, Illinois.

Q. And was that true generally of the trains that operated in both directions at that particular crossing?

A. Yes sir.

Q. Day in and day out?

A. Yes sir.

Q. What is the fact would there be both passenger and freight trains that go over that crossing?

A. Yes.

Q. And the passenger trains going east, coming from the west, where would they be going to?

A. Going east.

Q. Yes.

A. Washington, Jersey City, Washington, D. C., and Jersey City in New Jersey, that's New York, of course, because they use the busses.

Q. And the passenger trains that would be coming from the east going west, where would their destination be?

A. Cleveland, Ohio, Toledo, Ohio, and Chicago, Illinois.

Q. Were there many passenger trains that operated over that crossing during your shift?

A. Quite a number.

Q. Was that a daily occurrence?

A. Yes sir.

Q. Now was there a schedule of time for these trains to proceed across that crossing, as a general rule?

A. Passenger trains, yes sir.

Q. How about the freight trains?

A. No, that word was sent out in advance along the line.

Q. And did the passenger trains always arrive on schedule or did—

A. Oh no, they couldn't always arrive on schedule.

[fol. 22] Q. Sometimes behind on schedule?

A. Sometimes.

Q. And the amount of time they'd be behind on schedule would vary on different occasions?

A. That depends, there was quite a windstorm at one time I remember, Number 10 was coming down, down here right beside the State Line outside of Willard, that he run right through a barn, the wind had been so terrific it picked the barn up and set it across the track. He went through the barn and naturally that made him late. Incidents like that, it made him late.

Q. Now, Carl, will you tell us what your duties were as a watchman—how did you know a freight train was approaching a crossing?

A. By a signal light in the shanty.

Q. Will you tell us what kind of a signal light that was?

A. Yes, it was a small automobile bulb.

Q. What would happen when a train was approaching, so far as the bulb was concerned?

A. That light would flash on and off intermittently, just on, off.

Q. And was there a way of determining by the flash of that bulb the direction in which the train was approaching?

A. No sir.

Q. How did you ascertain, or know, which way the train was approaching before you went out to flag?

A. I never stayed in the shanty after the light came on, when the light came on it was my duty to be outside.

Q. Where did you go when the light went on in the shanty? When the light came on in the shanty, where did you go?

A. I was most generally setting in a chair and I'd walk outside and see that the lanterns were lit, take a look at [fol. 23] them. When the train got to a certain point I'd take the lantern and start out across the track to flag traffic.

Q. Did you have to watch to see which way the train was approaching after you got out of the shanty?

A. Yes sir.

Q. Assuming the train was approaching from the west, going east, where did your duties require you to be to flag that train?

A. Well that's a difficult question to answer. It would depend on the speed of the train, some slow trains come up through there and some fast passenger trains come up through there.

Q. Tell the jury what instructions did you have from the Company as to where you were to go to flag trains?

A. When I hired into the Company Mr. Harris sent me out and told me Mr. Gamble—he was watching out there, watchman—he told me that he would give me instructions as to how I was to handle the crossing, he said I should go out a couple of different days and not at the same time during the day.

Q. All right. Did you follow those instructions?

A. Yes sir.

Q. Now on this particular evening, where were you when you knew there was a train going to pass over that crossing? I am referring to January 2nd, 1952.

A. Eastbound? I was in the shanty.

Q. What at first attracted your attention there that there was a train approaching?

A. The light come on.

Q. When that light came on what did you do?

A. Got up, walked outside, it was cold weather, naturally; [fol. 24] I buttoned up my coat.

Q. Which way did you walk and where did you go to?

A. I went out of the shanty, and the lantern we kept on the step by the door, I glanced down at that and saw they were both lit. I picked up the lantern, looked down to see

where the train was at, walked across the street on the west-bound side of the tracks to flag it.

Q. Any reason you went west of the westbound tracks?

A. That was instructions, an eastbound train, a train going east the flagman should be on the west side of it so he can see if there's anything coming on the westbound.

Q. And if a train is going west which side do you flag from?

A. On the east.

Q. What I was trying to get at—those were your instructions?

A. Yes sir.

Q. Who gave you those instructions?

A. For one, Mr. Gamble did, when he was instructing me about flagging up there because I had never done any flagging on the railroad.

Q. What was Mr. Gamble's capacity with the railroad?

A. Crossing watchman.

Q. All right. Now what was the condition of the weather? You said it was cold. Any rain or snow?

A. No snow.

Q. Any rain?

A. No, I think the pavement was pretty dry.

Q. All right. When you walked you had to walk across the three tracks to get to the west side of the track?

A. Yes.

Q. When you got west of the track and you came to a stop where did you stop?

A. In the center of Tallmadge Avenue.

[fol. 25] Q. And that was before they widened Tallmadge Avenue, I believe?

A. Yes sir.

Q. And what did you do when you got to the center of Tallmadge Avenue?

A. By the time I got there the train was almost close enough—I had to look at traffic all four ways, if there was room I let two or three cars go through, if there wasn't I blew my whistle, turned my lantern so each one could see it, this shield on it, it's a fourteen-inch shield.

Q. You said something about a whistle?

A. I had it and used it, you never flag a crossing without a whistle.

Q. Which way did you face then after the train started to pull across the crossing?

A. After the crossing was blocked you have reference to?

Q. Yes.

A. I looked at the train, I looked anyway, that time, until I could see where the caboose was, then I had to look north towards Cuyahoga Falls to see if I could get a reflection, that was looking over my left shoulder.

Q. What was your reason for looking toward Cuyahoga Falls?

A. One to see if there was a reflection of a headlight coming around the curve. I couldn't see the light down at Evans Avenue.

Q. Why couldn't you?

A. The eastbound train was blocking it.

Q. All right. Was there a train due from the east about that time?

A. Yes sir. I had took word off the listener. We had just a listener, like your phone.

[fol. 26] Q. Where was that located?

A. In the shanty. The Detroit Steel was out at Ravenna about fifteen minutes before I went out to flag the eastbound. I got that report.

Q. All right. Now then when was it you looked to the left or to the north to see whether this Detroit Steel train was coming out of Ravenna?

A. I had my eye that way almost all the time I was flagging the eastbound.

Q. Which way were you facing at that time?

A. My body or my head?

Q. Your body? Let's take your body?

A. My body was facing northeast.

Q. Which way was your head?

A. My head was turned around my left shoulder so I could see up the track.

Q. What did you have in your hands?

A. A red lantern in the right and a green lantern in the left, and the red lantern had shields.

Q. You said the red lantern had shields on it. Tell us about it. What were the shields and what did they look like?

A: Well they're a piece about fourteen inches long, I guess that's about the length of it. There's two hooks that fasten on to the lantern and those shields stay there, they're flat right in front of the bulb, and then they edge out, that way, (indicating,) on both ends.

Q. What was the purpose of those shields?

A. For to keep from disturbing the engineer, if he sees a red light he knows what it is, it's a signal to stop, and if you get out and wave a red lantern he wouldn't know if you was waving it at him or traffic coming around.

[fol. 27.] Q. Now which lantern did you have in your right hand?

A. Red.

Q. Is that the one with the shields on?

A. Yes sir.

Q. And you had the green lantern in your left hand?

A. That's correct.

Q. Now while you were standing facing the way you were, were you able to see traffic back on Home Avenue at that time?

A. No.

Q. Were you able to see the traffic that was west of you that was going to go east?

A. No.

Q. Now after you were looking north, or left, to watch for this Detroit Steel train what, if anything, did you do?

A. In regard to what?

Q. As the caboose was approaching the intersection what did you do?

A. I turned my head real quick to the right and—

Q. Looking toward where?

A. Evans Avenue, and saw I couldn't see that light.

Q. All right. And then what happened, tell the jury in your own words, what happened?

A. I turned my head to look towards Cuyahoga Falls, that would be north, and I was watching for a train to come around there before I'd clear the crossing to let traffic through, and just as the caboose got up on the crossing I went to make just a step backwards and a turn, and that's when I got hit. From then on I didn't remember anything.

Q. Had you signalled traffic forward?

A. No sir.

[fol. 28] Q. Neither direction—

A. No sir.

Q. —before you were struck?

A. No sir. You don't never signal.

Mr. Roetzel: Object to that.

The Court: Sustained. You say you didn't signal?

A. No sir, I didn't signal traffic to move. I never blow a whistle—

Mr. Roetzel: Object.

The Court: Sustained. Disregard the fact he never blows a whistle.

Q. Mr. Roetzel said there was a light, in his opening statement; over here east of the B & O tracks right around in here in the vicinity of Tallmadge Avenue that had an amber light on it that signalled the approach of trains. Tell us about that light?

A. There was a pole there, it was shorter than a telephone pole, the telephone pole that's there now is probably—

Mr. Roetzel: Object to what's there now.

The Court: Sustained.

Q. Tell us about the height of the pole that was there then?

A. I'll tell you the truth, I don't know—I was going to say ten or twelve feet difference, as to the standard length of a—

Mr. Roetzel: Object.

The Court: Sustained, strike it, disregard it, jury.

Q. Was that amber light that Mr. Roetzel referred to on the east side of the tracks, was that light for all trains [fol. 29] that were crossing the crossing or for certain trains?

A. All of them.

Q. So when this train that was proceeding in an easterly direction or going north that you were flagging when you were hit, that light would have been amber at that time?

A. Yes sir.

Q. Now were you able to see this light over here on Tallmadge Avenue when this train was passing when you were standing over here west of the tracks? (Indicating.)

A. No sir.

Q. Would there be any change in the amber signal light located on the tracks on Tallmadge Avenue, if a train were coming from the east going west, if there was one already on the tracks from the west going east?

A. No.

Q. It would be the same signal?

A. That's right.

Q. Would that light which was east of Tallmadge Avenue, when there is a train on the track going east, would that light change if there was another train coming from the east going west?

A. If there was a train coming from the east, far enough east, it would be on the circuit.

Q. Would the light—the color of the light change?

A. No.

Q. Now just north of Tallmadge Avenue, these tracks continue, or is there a curve there?

A. It curves.

Q. Which way do the tracks curve, as you're going towards Cuyahoga Falls, do they turn to the right or left?

A. Turn to the right and then the left.

Q. How far from Tallmadge Avenue do the tracks extend 30 feet before they start to turn to the left, approximately?

A. Well approximately 200 feet, two, 250.

Q. Did you get a chance to actually see the light at Evans Avenue while the caboose was in that intersection?

A. No sir.

Mr. Roetzel: Object to what he got a chance to see.

The Court: Sustained.

Q. Did you see the light at Evans Avenue any time before you were hit that evening?

A. No sir.

Q. Now when you were hit by this automobile were you rendered unconscious, do you remember?

A. Yes sir.

Q. What's the next thing you remember then?

A. The next thing, when I came to there was a man standing towards the eastbound track, just a couple feet away from me and I told him—

Q. No, not what you told anybody. Where were you at that time?

A. In the middle of the westbound tracks.

Q. How long did you remain there before you were taken to the hospital?

A. Well I can't tell you just the time, I didn't know just what time it was when they picked me up.

Q. You remember of being placed in the ambulance?

A. Yes sir, they picked me up at the track, when they took me to the ambulance why the Detroit Steel came by.

Q. What hospital were you taken to?

A. St. Thomas.

Q. How long did you remain at St. Thomas Hospital?

[fol. 31] A. I was there eleven days, under Dr. Harvey Musser's care.

Q. He's a railroad doctor?

A. Yes sir.

Q. Then where were you removed to?

A. To City Hospital.

Q. And did you remain under the care of Dr. Harvey Musser?

A. I did not. I had Dr. Fowler Roberts.

Q. Also a railroad doctor?

A. Yes sir.

Q. And how long did you remain under the care of Dr. Fowler Roberts?

A. Well I was in the hospital under him for eighty-six days, that made ninety-seven days total.

Q. Where were you injured, Mr. Inman?

A. My right knee was bursted, and the left leg from the knee to the ankle was broken.

Q. You say bursted. Were the bones broken?

A. Yes sir.

Q. Was your leg laid open, was there a cut there, the leg laid open, the skin broken?

A. I don't know.

Q. What did Dr. Roberts do for you while you were in the City Hospital?

A. He done a lot.

Q. Were you in traction over there?

A. I was.

Q. Were you placed in a cast?

A. I was in traction with my right leg to see that the knee didn't shrink.

Q. How long were you in traction, your right leg in traction?

A. About five days, I would say.

Q. Then what was done for you?

A. It was a cast then, then he let me get outside the bed. This one (indicating), I had to keep straight, he'd get it outside, and then I could move it that way to get a little exercise.

[fol. 32] Q. How about your left leg?

A. They couldn't do anything with that. It was in a cast for 131 days.

Q. Where did that cast extend from?

A. Across my toes there, up to my hip. (Indicating.)

Q. When was that cast put on with reference to the time you went over to the City Hospital?

A. It was put on the next morning, on Monday morning.

Q. And when was it removed?

A. They removed it two or three different times.

Q. When was it finally removed, how many days after they put it on?

A. 131 days after.

Q. Did you suffer any pain with these injuries?

A. Certainly.

Q. And was the doctor in attendance daily?

A. Yes sir. There were two or three or four days he was off and his son took care of it—there was nothing to take care of, just to see it was all right.

Q. Now after you left the hospital where did you go?

A. To a private residence up on Eastland Avenue, right close to Tonawanda.

Q. What's the number of that, do you remember? Do you know the name of the man and lady?

A. Gehrler.

Q. And when you went to that home were you able to be up and around right away?

A. I could be around a little on crutches.

Q. Your leg was in a cast at that time?

A. Yes sir.

Q. How long was the cast on the right leg, Carl?

[fol. 33] A. From here to here (indicating.)

Q. From the middle of your hip to your toes?

A. Yes sir.

Q. How many weeks was that cast on?

A. I would say five and a half to six weeks.

Q. Now then where was the cast on your left leg—when was that case removed, when was the cast on your left leg removed?

A. You mean permanently?

Q. Yes.

A. 131 days after the 2nd of January.

Q. Where was it removed? At the home where you were staying or the hospital?

A. No, I came down to Dr. Roberts' office in the Akron Savings & Loan and he sent me up to the City Hospital and his son Jim took it off.

Q. Then after the cast was removed were any other measures taken for your left leg?

A. There were X-rays taken of it.

Q. Was there a brace put on of some kind?

A. Not on the left, on the right.

Q. When was the brace put on your right leg?

A. Before I left the City Hospital.

Q. What kind of a brace was that?

A. It was a steel brace. I have it laying right over there. (Indicating.)

(Mr. McGowan gets brace.)

Mr. McGowan: Mark this Plaintiff's Exhibit 1.

(Plaintiff's Exhibit 1 was marked.)

Q. Handing you what has been marked for identification purposes, what is that? (Handing Exhibit to witness.)

A. That's the brace for my right leg to keep it strength- [fol. 34] ened in the knee, that it didn't give over, because

I couldn't put all my weight on this. I tried to do, as near as I could—this brace, you can put your shoe on, it's like two braces, the heel is fixed, that stands like that. (Indicating.) There was no knee bend in it for about six weeks, I guess, and then they sent it over and had knee bend put in while I was still in the hospital.

Q. How long did you continue to wear this brace?

A. Something over a year and a half.

Q. Who prescribed that brace for you, who was the doctor?

A. Dr. Roberts.

Q. Now were you able to get along with the use of the brace without anything else?

A. Oh no.

Q. When was it you first started to get up and around, how long after you got home from the hospital?

A. I'd get up in the room, on the floor, my room was—I got up the next day.

Q. I mean to go outside?

A. I was outside within the first five days, I guess.

Q. Were you able to do any extensive walking?

A. Oh no, when I done that I had my cast on the left leg and the brace on the right leg.

Q. After your cast was removed from the left leg were you able to get out and do any walking?

A. I could do a little bit, yes, with the aid of my brace and a pair of crutches.

Q. When did you first start to use crutches?

A. I was using them when I came out of the hospital.

[fol. 35] Q. How long did you continue to walk with crutches?

A. About eight months.

Q. And were you able to walk without crutches for eight months?

A. How's that?

Q. Were you able to do any walking without crutches?

A. When I laid them up it was about eight months; I had two canes.

Q. How long did you use two canes?

A. I'd say four months.

Q. And then what did you do, how did you walk?

A. Then I got rid of one.

Q. How long did you continue to use the one cane?

A. I still do at times, not steady.

Q. What is your occasion for still using the one cane?

A. When the leg gets to hurting me and bothering me too much.

Q. How frequently is that?

A. That's happened quite often.

Q. Is there any particular time that occurs?

A. Well the weather has something to do with it.

Q. What do you notice about weather change?

A. Pain down here (indicating).

Q. Is that the left leg?

A. Yes.

Q. Left leg and foot?

A. Yes.

Q. How about your right leg?

A. It doesn't seem to bother me, but when I wear a brace I have to wear it on the right one, the brace is made for the right one, to hold the weight, instead of putting it all on this one. (Indicating.)

[fol. 36] Q. Are you able to do any work at this time or have you been able to do any work since this occurred?

A. What would you term the word "work"?

Q. Any physical work?

A. No physical work, no.

Q. Why not?

A. On account of my leg.

Q. Why can't you do any physical work?

A. It won't stand up under it.

Q. What have you noticed when you tried to do any work?

A. I noticed I had to give it up, I tried to mow the lawn one day.

Q. What occurred?

A. It occurred I couldn't do it, I made a couple of turns across the lawn and that was all.

Q. What did you experience when you did that?

A. There was a little bit of a grade, just a small one, like that, (indicating), and going one way with the lawn mower wasn't too bad, because my right leg was down on the little grade, but coming back the other way my left leg was down there and it wouldn't work.

Q. Have you had any experiences with your leg since this occurrence, any incidences?

A. Yes.

Q. Tell us about those?

A. Well I fell once over in my room.

Q. What was the cause of that?

A. The leg give out.

Q. Which leg?

A. Left leg.

Q. When was that?

A. That was about February, three years ago last February.

[fol. 37] Q. Have you had any other experiences?

A. Yes sir, I had two since then.

Q. What occurred?

A. I fell in my room under the same circumstances, the leg just give out and once I fell on Market Street, they were repairing a building over there, they had a scaffold, doing the work up high. The leg gave out underneath me. I went to catch myself but I didn't. I got it here (indicating), and carried a black eye for a week or ten days over the effects of that.

Q. Now this pain you experience in your left leg from time to time, is it more pronounced from a change in cold weather or from warm to cold?

A. No, it pains more when it's cold.

Q. And where does the pain start, where is the pain?

A. I don't know which end it starts at, right about there, (indicating), clear down in here, right there. (Indicating.)

Q. I believe they put a silver pin in your leg there?

A. Yes sir, supposed to be nine and a half inches long. I can't say that's the length of it.

Q. Is that pin still in your leg?

A. Yes sir.

Q. Mr. Roetzel in his opening statement says when you were hit you were making a turn to face the traffic. What do you say as to that?

A. I was moving one foot, that was it, the only one I moved was this one. (Indicating.)

Q. Indicating the right. What was the purpose of moving that, to look at traffic?

A. Yes sir, when I went to look at that sign on Evans Avenue—

Q. You misunderstood me. When you took that step [fol. 38] just before you were hit what did you take the step for?

A. To look on Evans Avenue, to see if the train was coming on Evans Avenue.

Q. Had you given the signal for traffic to move either direction before you were hit?

A. No sir.

Q. Had you had occasion to look at the

Mr. Rootzel: Object.

The Court: Sustain it.

A. The only—

Q. That's all. You may cross examine. Wait a minute, one or two more questions. Have you had any occupation since this occurred, have you been able to do anything?

A. Yes I've done a little bit.

Q. What have you done?

A. I've watched the door over at East Akron Eagles, that only included on a Saturday night and Sunday.

Q. Do you sit down or stand up?

A. Sit down.

Q. How much did you earn at that work?

A. I got a dollar an hour.

Q. How much did that average a week?

A. \$15.00 for Saturday night and Sunday.

Q. When did you first start to do that after you were injured?

A. Late in 1954.

Q. Do you have work at that continuously, or have there been intervals when you haven't?

A. Been intervals when I haven't.

Q. How long would the intervals be, how long would you say at one time?

A. One time I know was four months.

[fol. 39] Q. Are you able to stand any length of time on your leg?

A. After I get up and get the leg in circulation I can stand but if I sit down, and the chair doesn't happen to be

just the right height the leg goes dead on me, just that one, and when I get up I can't start off.

Q. Do you have trouble with your circulation? What trouble do you have with your circulation?

A. That's all I can tell you, I have no numbness any place else.

Q. Did you ever have any numbness before?

A. I always have.

Q. Did you have numbness before you were injured?

A. No sir.

Mr. McGowan: That's all.

The Court: Now during the recess overnight—we have a Judges' meeting at 3:00 o'clock—so I'm going to adjourn court insofar as this trial is concerned, until tomorrow morning at 9:00 o'clock. During the interim the Court charges you not to talk with anyone or allow anyone to talk with you or listen to any conversation pertaining to the subject matter of this trial, nor express nor form any opinion thereon until after the case has been given you for final deliberation. I want you to dismiss this case completely from your minds. Don't talk to your husbands or wives, friends, or anyone. Just don't think about it until tomorrow morning when you come back in the court at 9:00 o'clock to resume the testimony of the witnesses.

Thereupon the court was adjourned until 9:00 o'clock (fol. 40) A.M., September 10, 1956, at which time court having convened pursuant to adjournment, the trial of said case proceeded as follows:

STIPULATION RE BENEFITS

(The following occurred in the absence of the jury.)

Mr. Rootzel: It is stipulated and agreed between counsel for the Plaintiff and counsel for the Defendant that the amount of benefits heretofore paid to the Plaintiff by the Railroad Retirement Board pursuant to the United States Statute in the amount of \$862.00 shall be deducted from any amount hereafter paid to the Plaintiff either as settlement or if no settlement is effected shall be deducted from any judgment rendered in his favor. The stipulation is with

the same force and effect as if the Defendant had pleaded the payment and asked that same be set off.

COLLOQUY

Court Bailiff: Juror Number 4 is having some trouble with her mouth. She said something in Court yesterday that she was having trouble.

The Court: You indicated in court yesterday you had some trouble only when you talked.

Juror Number 4: The partial was rubbing against my mouth, there's kind of an infection in my mouth. Even after I left—

The Court: Talk a little louder.

Juror Number 4: I was having trouble because of this partial. I had some teeth pulled and the partial fits close to where one of the teeth was pulled from. All day yesterday it was irritated and made it hurt. I went to the dentist yesterday and he said I shouldn't wear this partial until [fol. 41] this place is healed. And I have a statement from him. Of course by wearing this partial, it fits over this tooth and it caused this tooth next to it to hurt and it makes it awfully uncomfortable.

The Court: Do you have to wear your partial?

Juror Number 4: I need to wear it, it makes it hard for me to talk without it. The partial doesn't matter, but it's the pain that comes from it.

The Court: You have the pain only when you wear the partial?

Juror Number 4: No, it's this rubbed place, since this place was irritated.

(Thereupon Mr. Roetzel and Mr. McGowan talk to Court at bench.)

(Thereupon Court and Mr. Roetzel and Mr. McGowan go to Court's chambers.)

The Court: Both attorneys have agreed to excuse you because of the fact that you are in pain and you did indicate something along that line yesterday and I remembered it, but you didn't bring it up again when you were finally seated. You will be excused. (Juror Number 4

leaves court room.) Now, Mary Gebbert will you take that chair, please.

(13th or alternate juror takes chair just vacated.)

The Court: Let the record show that counsel for both sides have agreed to excuse Lucy Campbell because of her physical condition and for the seating of Mary Gebbert, Alternate Juror, as now Juror Number 4 as a member of the jury. Let the record further show in the event there [fol. 42] is an absence of one of the twelve jurors through sickness or other excuses that both sides have agreed that the case will continue and will be submitted to a jury of eleven.

Mr. Roetzel: That's correct.

Mr. McGowan: Yes.

Mr. Roetzel: In case one juror is excused.

The Court: In case of a disability of one juror.

Mr. Roetzel: If the Court excuses a juror for any reason we will go ahead with the remaining eleven.

The Court: Yes. All right.

Mr. McGowan: Carl, will you take the witness stand.

Thereupon in order to further maintain the issues on his part, the Plaintiff resumed the stand.

Direct examination (continued).

By Mr. McGowan:

Q. Carl, one or two more questions I'd like to ask. What overhead lighting was there at that intersection back on the 2nd of January, 1952, on the date of this occurrence?

A. Overhead?

Q. Over the tracks. We'll limit your answer to just over the tracks.

A. No lights.

Q. What overhead lighting was there west of the tracks on Tallmadge Avenue?

A. There was one light about twenty five to thirty foot west of the track on the south side of Tallmadge Avenue.

Q. Was that west of the track or west of the intersection?

A. West of the track.

Q. And which side of Tallmadge Avenue was that on?
[fol. 43] A. South.

Q. And were there any lights on the north side of Tallmadge Avenue?

A. There were not, no sir.

Q. And what kind of a light was this that was west of the tracks on Tallmadge Avenue that you just told the jury about?

A. I can't explain much about lights. It had something like a plate up over it, almost a flat plate, and when they changed bulbs they had to reach up with a long stick and take that bulb out, then put another one in the end of the pole and put it back up there.

Q. And how high from the ground was that light, approximately?

A. Well I'd say about twenty-two to twenty-five foot.

Q. That was a City light, was it?

A. City light, yes sir.

Q. Were the rays of that light, did they extend on down to the position where you were the night you were flagging that train?

A. No sir, the rays of the light wouldn't extend that far in either direction.

Mr. Roetzel: Object to this line of questioning.

Mr. McGowan: I'm just showing—

Mr. Roetzel: There's no claim of this kind in the petition.

The Court: The Court will allow that. Go ahead.

Mr. Roetzel: In other words, we have an objection to all this line of testimony, without making an objection to each question.

The Court: Yes.

[fol. 44] Mr. McGowan: Mark these Plaintiff's Exhibits 2 to 9.

(Plaintiff's Exhibits marked 2 to 9.)

Q. Now, Mr. Inman, I'll hand you what has been marked for identification purposes as Plaintiff's Exhibit 2 and I'll ask you to look at that photograph, and I'll ask you whether you can tell the jury what that photograph depicts? (Handing Exhibit to witness.)

Mr. Roetzel: Object unless the photograph can portray conditions as existing on January 2, 1952.

The Court: is that true?

Mr. McGowan: Here he is getting into this, these pictures were taken sometime after that date.

Mr. Roetzel: I can't hear you.

Mr. McGowan: These pictures were taken after that date. We're only offering them to show the position of the tracks and the respective highways as they crossed, and for no other purpose, and the contour of the highways.

Mr. Roetzel: I object to them.

The Court: Insofar as those facts are concerned, has there been any change?

Mr. McGowan: No.

The Court: The contour, the position of the highway?

Mr. McGowan: Except the widening.

Mr. Roetzel: I object to that. It's misleading, and the jury, assuming this is admitted in evidence, the jury will have a picture of the conditions that aren't as they existed.

[Vol. 45] Mr. McGowan: What is this that doesn't exist?

Mr. Roetzel: I don't know.

Mr. McGowan: If the witness says it's the same the jury has a right to consider it. If you have pictures you can present them.

Mr. Roetzel: We have pictures taken within ten days.

Mr. McGowan: He was in the hospital for a hundred days.

Mr. Roetzel: I'm willing to have the pictures if our pictures can be used.

The Court: Do you want to show them?

Mr. McGowan: Yes, I'll be willing to do that.

(Mr. Roetzel hands photographs to Mr. McGowan.)

Mr. Roetzel: Those were taken on the 15th of January, 1952, and to the best of my knowledge conditions were the same as they existed on the 2nd of January, 1952.

Mr. McGowan: All right. Mark these Plaintiff's Exhibits 10 to 13.

(Plaintiff's Exhibits 10 to 13 were marked.)

Q. Now, Mr. Human, I'll hand you what has been marked for identification purposes as Plaintiff's Exhibit 10, I'll

ask you to look at that picture and tell the jury what that picture portrays? (Handing Exhibit to witness.)

A. Tallmadge Avenue going that way. (Indicating.)

Q. Which way?

A. That's north.

The Court: That is, you are looking north?

Q. Or Home Avenue?

Mr. Roetzel: Just a moment, I want the record to show [fol. 46] counsel made a suggestion.

Mr. McGowan: Let the record show I made a suggestion to the witness.

Mr. Roetzel: Mr. McGowan said, after the witness said "Tallmadge Avenue," Mr. McGowan said "This is Home Avenue."

A. That's Home Avenue looking north, Tallmadge Avenue crossing this way. (indicating), you can see very little of it.

Q. What's this over here?

A. Watchman's shanty.

Mr. Roetzel: May I interrupt. Let the record show when the witness said "Tallmadge Avenue is this way," he moved his finger across the photograph.

Q. I'll hand you what has been marked for identification purposes as Plaintiff's Exhibit 13, and ask you to look at that and tell the jury what that represents? (Handing Exhibit to witness.)

A. That's the railroad tracks at the crossing going north from the crossing. (Indicating.)

Q. And what's this areaway, the lower part of the picture, what does that show?

A. That there is the intersection from Tallmadge Avenue to Home Avenue. (Indicating.)

Q. On which side of the tracks?

A. On the west side.

Q. And is that a true and correct representation of that intersection as it was on the 2nd of January, 1952, so far as you can remember?

Mr. Roetzel: I'll say professionally it is my understanding it is.

Mr. McGowan: Then we won't have to ask this question. [fol. 47] The Court: All right.

Q. Now then I'll hand you what has been marked for identification purposes as Plaintiff's Exhibit 12 and I'll ask you to look at that picture and tell the jury what that picture represents? (Handing Exhibit to witness.)

A. Home Avenue looking north from the Pennsylvania Railroad track across the B & O tracks and looking straight north.

Q. What's this building over here on the right? (Indicating.)

A. That's Albrecht's warehouse.

Q. And do you see the shanty on that picture?

A. Yes sir.

Q. Where is it?

A. Right there. (Indicating.)

Q. Will you put an X where the shanty is on that picture, Mr. Inman?

A. (Witness marks on Exhibit with red pencil.)

Q. Now then where are the Pennsylvania tracks? Will you put a P where the Pennsylvania tracks are located?

A. (Witness does so.)

Q. And will you put a B where the B & O tracks are located?

A. (Witness does so.)

Q. Now going back again to Plaintiff's Exhibit 10 I'll ask you to make an X at the point where you were standing that night when you say you were facing east. Can you point—can you put an X on that picture approximately where you were standing?

A. (Witness does so.)

[fol. 48] Q. Now I mean where you were standing when you were hit, is that right, is that about right?

A. That's right close, yes sir.

Q. That's where the red mark is?

A. Yes sir.

Q. Now I'll hand you what has been marked for identification purposes as Plaintiff's Exhibit 3 and I'll ask you to look at that photograph and tell the jury what that portrays, if you can? (Handing Exhibit to witness.)

A. Tallmadge Avenue looking east from the railroad tracks and a section of west of the railroad tracks.

Q. Will you mark the west railroad tracks with a W?

A. West of the tracks?

Q. The west tracks, will you put a W where the west tracks are?

A. (Witness does so.)

Mr. Roetzel: Object to the use of this photograph because it doesn't show conditions as they were.

Mr. McGowan: I have a right to question the witness.

The Court: Overruled. Go ahead.

Q. Now then I believe you have testified that Tallmadge Avenue, since this occurrence, has been widened on both sides, is that right?

A. Yes sir.

Q. That is the paved portion of the street?

A. The paved portion, yes sir.

Q. How much on the north side of the street, how much was the paved portion extended since January 2nd, 1952, if you know, approximately?

A. I'd say approximately around five foot.

[fol. 49] Q. And on the south side of the street how much was the pavement extended?

A. That was wider, I'd say probably six and a half foot.

Q. Now has that picture, with the exception of the widening of the street, which is shown on there, is that picture so far as Tallmadge Avenue is concerned, at the railroad crossing, and so far as the railroad tracks are concerned, and so far as the area which you can see extend into Home Avenue is concerned, is that the same as it was, is that a true and correct representation of the condition as they were at that crossing January 2nd, 1952?

A. Yes sir, all except the widening.

Q. Handing you Plaintiff's Exhibit 4 I'll ask you to tell the jury what that represents? (Handing Exhibit to witness.)

Mr. Roetzel: Object unless it shows conditions as they existed at the time of the occurrence.

The Court: Overruled.

Q. It shows the tracks at the crossing and north of the crossing as they existed at that time, on the 2nd day of January, 1952?

A. Yes sir.

Q. And does it also show Tallmadge Avenue as it crossed the tracks at that intersection?

A. You can see on the tracks where Tallmadge Avenue is, it's in here. (Indicating.)

Q. I wish you would mark on that photograph, put an S where the switch track is located.

A. (Witness does so.)

Q. And will you put an E for the eastbound railroad [fol. 50] track?

A. (Witness does so.)

Q. And will you put a W for the westbound railroad track?

A. (Witness does so.)

Q. Now will you indicate by an X where the curve begins, where the curve begins on that picture, the curve?

A. The curve on the railroad track?

Mr. Roetzel: Object to that. The jury can see as well as he can.

The Court: Sustained.

Mr. McGowan: I'll withdraw my question.

Q. Now I'll hand you what has been marked for identification purposes as Plaintiff's Exhibit 6, and I'll ask you to look at that picture and tell the jury what that picture represents? (Handing Exhibit to witness.)

Mr. Roetzel: Same objection.

The Court: Overruled.

Q. The Court says you may answer.

A. That shows a small space west of the tracks on Tallmadge Avenue, across the tracks, then it shows part of the intersection between, that runs from Tallmadge Avenue to Home Avenue.

Q. On which side of the tracks?

A. West.

Q. Now will you make a T where the picture shows Tallmadge Avenue, west of the tracks?

A. (Witness does so.)

Q. And will you mark an A where the picture shows the areaway between Tallmadge Avenue and Home Avenue, [fol. 51] west of the tracks?

A. (Witness does so.)

Q. Now with the exception of the widening of Tallmadge Avenue, west of the tracks, on both sides that you have testified to, is that picture as you look at it, is that a true and correct representation of the street, Tallmadge Avenue, and the areaway between Tallmadge Avenue and Home Avenue, west of the tracks, and the railroad tracks as they were in existence on the 2nd day of January, 1952?

A. Yes sir. May I have the privilege of changing that and moving it up that way, it's not out either way. I got it on the westbound track.

The Court: Yes.

A. (Witness does so.)

Q. Now what is the distance, if you know, Carl, what was the distance that night on January 2nd, 1952, from the place where you were standing at the time you were struck, that is west of the westbound track on Tallmadge Avenue over to Home Avenue, west of the tracks, what is the closest distance between the place you were standing at the time you were struck, and over to Home Avenue, west of the tracks?

A. Well this will only, it won't be perfect but it will be a guess to the best of my ability.

Q. All right.

Mr. Roetzel: What did he say?

Mr. McGowan: To the best of his ability.

Mr. Roetzel: I object to the guessing.

The Court: He means an estimate.

A. Yes.

[fol. 52] Q. What is your best estimate as to the distance in feet?

Mr. Roetzel: Object.

The Court: Overruled.

A. I would say sixty to seventy foot.

Q. Now yesterday, last night, I believe, at the request

of Mr. Roetzel you were examined by Dr. Roberts again, you had a physical examination by Dr. Roberts, did you not?

A. I did, yes sir.

Q. That was in Dr. Roberts' office?

A. Right.

Q. At 640 West Market here in the City?

A. Yes sir.

Q. You went there at the request of Mr. Roetzel?

A. I did.

Mr. McGowan: I think you may cross examine.

Cross examination.

By Mr. Roetzel:

Q. You had worked for the B & O from 1946, was it?

A. I believe it was 1945 when I started out at Second Avenue, 1946 when I went up to Bettes Crossing, it was in January of 1946.

Q. Then you worked there continuously up until the time of this occurrence?

A. That's right.

Q. You are now retired?

A. Yes sir.

Q. Under the Railroad Retirement Act?

A. No sir.

Q. Not under the Railroad Retirement Act?

A. No sir, on account of injury.

Q. I see. What did you do before you went to work for the B & O?

A. I was with the Aircraft.

[fol. 53] Q. Pardon?

A. I was with the Aircraft, Goodyear Aircraft.

Q. How long were you at Goodyear Aircraft?

A. Seventeen months.

Q. And what kind of work did you do there?

A. Building ammunition racks for Grumman Airplanes.

Q. And that was in what year, was that immediately before you went to work for the B & O?

A. Yes sir.

Q. What did you do before that?

A. I. was with the—I was guard up at the National Standard Wire Works up on Home Avenue.

Q. And how long were you there?

A. Around a year, I would say.

Q. How?

A. About a year, I would say.

Q. What year was that, was that immediately before you went to Aircraft?

A. Yes sir.

Q. Then what did you do before that?

A. To the best of my knowledge I was with the Adamson Machine Company.

Q. When was that?

A. That was just before I went—

Q. To the steel works?

A. No, now wait, there was a little while in between there, I went from Adamson's to the railroad and worked about eight months.

Q. That was the B & O?

A. Yes sir.

Q. Then you quit there and went—

A. To the Wire Works.

Q. And what did you do before you were at Arlington?

A. Where?

[fol. 54] Q. Before you were at Arlington what did you do?

A. Before I was at Arlington?

Q. I thought you said Arlington.

A. No, Aircraft.

Q. Maybe I misunderstood you. Adamson's, you said?

A. Yes.

Q. What did you do before you were at Adamson's?

A. I was school policeman at the corner of Beaver and Exchange.

Q. That was in what year?

A. It was in the late '40's, I can't tell you the exact year.

Q. How long were you a school policeman?

A. Two seasons.

Q. And what kind of work did you do before that?

A. I was with the Sumner Butter Company.

Q. When was that?

A. I left there in 1932, and I was there fourteen years.

Q. From then to the '40's, what did you do?

A. Just odd jobs.

Q. When you went to work for the B & O, you testified yesterday that you were sent up to take instructions?

A. Yes sir, that's when I went to that crossing.

Q. That crossing? Tallmadge Avenue crossing?

A. Because the crossing out here I was at, there was one train went to Canton each day and came back.

Q. Now you were given a book of Rules, were you not, on the outside of which says "The B & O Railroad Company Instructions governing the maintenance of that department"?

A. We had that on a card posted up in the shanty.

Q. I say you were?

A. No sir, I did not get one of those books.

[fol. 55] Q. Did you get the Rules?

A. We got them off that posting that was in the shanty, yes sir.

Q. And you read those Rules?

A. Yes sir.

Q. You were familiar with them?

A. I would say yes.

Q. And were you familiar with Rule 132 which reads, as follows:—you can read it with me as I read it. Can you see it?

A. Yes sir.

Q. All right. "132: Crossing watchmen will provide themselves through the track foreman with the following flagging equipment and keep it in good order and ready for use."

A. Which one are you reading?

Q. This. (Indicating.)

A. I was reading here. (Indicating.)

Q. You read down to the end of the third line now, including the word "use."

A. Yes sir. (Witness looks at paper.)

Q. All right. "And will also provide themselves with a shrill whistle to be used in attracting attention when flagging a crossing;" heavier printing "Day— one Stop disk, three red flags, six or more fuses, six or more torpedoes." Heavier print "Night— two red lamps, one white lamp, one green lamp, six or more fuses, six or more torpedoes; day and night, one shrill whistle." Did you provide yourself with those various things?

A. Yes sir.

Q. Now did you from then on, for instance, if you used a fusee or torpedo you'd replace it?

A. That's right.

Q. And you at all times had in your possession two red lamps, one white lamp, and one green lamp?

[fol. 56] A. Not at all times.

Q. They were available for you?

A. In the shanty, a red and white lamp set on one side of the door, a red light with shields on, and a green light set opposite the door where it was handiest to get as we went out.

Q. Yes. In other words, you had the duty under this Rule to keep it in good order and ready for good use?

A. I trimmed the lanterns every day and saw they were burning, the wicks level so they'd—

Q. Those were kerosene lamps?

A. Yes.

Q. And you kept the wick in such condition it would burn an even light?

A. Somewheres near even, yes sir, and the globe.

Q. The globes? The glass, you call that a globe? You kept that at all times clean?

A. Cleaned once a day.

Q. So that the rays of light were plainly visible to anybody looking, they could see it was a red light or green light by looking at it?

A. I would say yes.

Q. Now let's go to Rule 133. If you will follow me.

A. Crossing watchmen will at all times be in position to observe the approach of engines, trains or track cars and

highway traffic." You were familiar with that part of the Rule?

A. Yes.

Q. "B. When a train, engine or track car is approaching, watchmen must place themselves in the middle of the highway near the track and display a stop disk by day holding it in an upright position so that the flat side can be seen by any person approaching on the highway. At night (Vol. 57) when disk cannot be plainly seen they will take the same position and protect the highway traffic with a red lamp."—red being in larger print "on displaying the 'Stop' disk by day, and" larger letters "the red lamp by night, the watchman will attract attention by blowing a succession of short blasts on the shrill whistle." You were familiar with that Rule?

A. Yes sir.

Q. Now C: "Where there are two or more tracks the watchman will when practicable take a position near the opposite track from the one on which a train, engine, or track car is approaching, where they can best warn highway traffic of a train, engine or track car approaching on the other track."

A. That's right.

Q. "D. When it is safe for highway traffic to move over the tracks crossing watchmen will signal such traffic to cross. By day this signal will be given by wave of the hand" in heavier print "with the Stop disk, and at night with a green lamp" "green" in heavier print. "The watchman should stand sideways to the highway traffic in giving hand or green lamp signals." Were you familiar with that?

A. Yes. We didn't exactly go by that.

Mr. Roetzal: Move that be stricken.

The Court: Sustained, disregard that, jury. Were you familiar with that Rule?

A. Yes sir.

Q. Now on this particular night of January 2nd, 1952, as an eastbound freight train approached, you say that the light lighted in the shanty?

A. Yes sir.

[fol. 58] Q. Do you know at what distance from the shanty the train, or the locomotive would be, assuming the locomotive was at the head of the train, the locomotive would be, when that light would light?

A. What distance from the crossing?

Q. Yes. In other words, what I'm trying to ask you is the length of the track circuit, as you call it in railroad parlance, about how far away?

A. On the westbound I think it was a longer distance. I think it would be about, possibly four thousand foot away from the crossing.

Q. You mean that for a train coming from the east and moving west—

A. Yes sir.

Q. —that light would light when the locomotive at the head of the train arrived at a point about four thousand feet from the crossing?

A. Yes sir.

Q. That's your estimation?

A. Yes sir.

Q. You say that was longer than the one coming from the west and going east, didn't you so state?

A. Yes sir.

Q. How long then would it be for the one coming from the west and going east?

A. Well I'd say that would be around twenty-five hundred feet, twenty-five to three thousand.

Q. Ever attempt to measure it yourself?

A. No sir, I never have. In fact, I never walked it.

Q. While I'm on that subject, there was a different circuit for the flasher lights which were located at this crossing than there were for the train circuit? Do you understand?

A. No, the light in the watchman's shanty came on at the same time that the crossing lights for automobiles, for traffic, came on.

[fol. 59] Q. Is that your recollection?

A. When the light in the shanty came on.

Q. That the light of the train, for the train, came on at the same time the City flasher lights came on?

A. That isn't City flasher lights, that's railroad lights.

Q. All right. It's a railroad flasher light. I mean the street flasher lights as distinguished from the railroad?

A. That's right, I think.

Q. Your recollection is that after being there how many years—

A. Since 1946.

Q. —you were there for six years and in that six years your observation was the flasher lights for highway traffic came on at the same time the light came on for a train approaching?

A. Yes sir.

Q. If I were to say to you that the flasher circuit was different than the so-called block circuit, would that mean anything to you?

A. That is to my recollection, that the two lights, that the light in the watchman's shanty, to warn him, came on at the same time that the—

Q. All right.

A. Because there was—you couldn't see the lights from the crossing.

Q. Now these flasher lights about which I made mention, were located as you come in a northerly direction on Home Avenue toward the crossing, there were flasher lights there, were there not?

A. Yes sir, on the right hand side.

Q. There were flasher lights as you come in a southerly direction toward the crossing?

A. Yes sir.

Q. Flasher lights on the west side of the crossing as far as you go in an easterly direction on Tallmadge?

A. Yes sir.

Q. There were likewise flashed lights as you go in a westerly direction toward the crossing just east of the crossing?

A. That's right.

Q. Those were equipped with a disk which had in it a red lens or red glass?

A. They were red when they come on, yes sir.

Q. The glass itself was red?

A. That I couldn't say, whether the glass was red, or not?

Q. It showed red?

A. Yes sir.

Q. And that was alternating, flashing on and off?

A. Yes sir.

Q. That was a double light, one at each edge?

A. Yes sir.

Q. Those were also located on—they were located either on or in close proximity to the conventional crossarm railroad sign?

A. Yes sir.

Q. Now on this particular night when this occurrence happened, do you remember the number of the train which moved east across the crossing?

A. I do not.

Q. Was that a train which came regularly at about that time?

A. We always had trains in the evening, about that time.

Q. What I'm trying to learn, did this train move across that crossing at approximately the same time every night?

A. I can't give you that time.

Q. It was a freight train, was it?

A. Yes.

[fol. 61] Q. Do you remember how it was powered? By Diesel?

A. No, steam engine.

Q. Was there a single locomotive or two locomotives?

A. I couldn't give you an answer on that.

Q. All right. What was it, a loaded train, or a train of empties?

A. Loaded.

Q. And upon what do you base that statement that it was loaded?

A. The doors were closed.

Q. Pardon?

A. The doors on the cars was closed on the side I was on.

Q. Uh huh.

A. In other words, if they'd been open, sliding back and forth, some of them, why then I would have known they were a load of empties.

Q. What kind of cars were in that train?

A. To my knowledge they were mostly box cars.

Q. You remember of seeing approximately how many box cars in that train?

A. I couldn't say as to that, I'd only have to make a guess, my guess would be about forty, forty-five.

Q. You mean there were forty, forty-five box cars?

A. Yes sir.

Q. How many cars were there in the entire train?

A. That's what I meant.

Q. You mean they were all box cars?

A. That I can't say, they might have been all box cars and there might have been a few others mixed in. I couldn't say as to that.

Q. Did you watch them as they passed you?

A. I'd glance at the train every once in a while, yes sir.

[fol. 62] Q. Do you have a distinct recollection of seeing about how many box cars there were?

A. The only thing I can do is make an estimate, there were about forty, forty-five cars in the whole train.

Q. Were there any what we call "gondolas"?

A. I couldn't answer that.

Q. You have no recollection?

A. I couldn't answer.

Q. Have you any recollection of seeing any gondolas in that train?

Mr. McGowan: I object, he's said he didn't know.

The Court: Sustained.

Mr. Roetzel: He said he couldn't answer.

A. I have no recollection.

Q. Any flat cars?

A. I have no recollection of that.

Q. About how fast was that train moving?

A. Probably when it came to the crossing it was running about fifteen to eighteen miles an hour.

Q. Did it continue that speed throughout the movement of the train up to the crossing?

A. No, it had slowed down.

Q. Slowed down?

A. Slowed down, yes sir, I'd say to around twelve miles an hour, twelve to fifteen, I'm not a good judge on that.

Q. How long were you out on that crossing before the locomotive arrived at the crossing, about?

A. I was across the track on the west side of the track where I stood to flag, that's where I stood close to flag when the train was—I would judge two thousand feet away from me.

[fol. 63] Q. You could see the headlight on the locomotive?

A. Oh yes, that's why I had to be—the reason I had to be there.

Q. I didn't ask the reason. The reason you took the west side is because under this rule, those were your instructions, is that correct?

A. Yes sir.

Q. The train was moving east so you stationed yourself on the west side?

A. Yes sir.

Q. There's another thing I want to ask you, in addition to having this light in the shanty, which lighted up whenever there was a train came in the circuit, there was a telephone?

A. The telephone was outside.

Q. There weren't any inside?

A. No, there was a listener inside that we could listen to orders given out up at, down in the yards and then up at—

Q. XX Tower?

A. Yes sir.

Q. What's XX Tower so the jury can understand.

A. I never was up to it.

Q. You do know there's a man up there, a dispatcher who keeps track of trains and by listening to his conversation you know where various trains are?

A. Yes sir, along the line.

Q. Then in addition to that, outside of the booth there was a telephone, what is the purpose of the telephone?

A. That was a B & O phone, that isn't a city line.

Q. What is the purpose of that telephone?

A. So they could call up, the train crews could stop, any of the employees could use it and call in the yards if [fol. 64] they had any trouble.

Q. They could call you for information, or you could call for information?

A. Yes sir.

Q. All those things were at your disposal on January 2nd, 1952?

A. Yes, if it was necessary to use them.

Q. This equipment you had was standard equipment for railroad crossing watchman?

A. That's right.

Q. Now when you went out on the crossing as this train was approaching what did you do first, did you do anything with your lanterns?

A. Yes I picked them up, sometimes carried them both in one hand.

The Court: What did you do on this occasion?

A. Picked up the lanterns and walked across the tracks on the west side to flag an eastbound train.

Q. Were the lanterns lighted?

A. Yes sir.

Q. And what were the colors?

A. Red and green.

Q. And in which hand were you holding the red lantern?

A. Right.

Q. And the green in your left?

A. Yes.

Q. Did you make any movement with either one of those lanterns?

A. Not until the train got close enough to the crossing for me to blow the whistle and start swinging the red lantern, there were four streets and with the shields on I had to swing my red lantern for Tailmadge Avenue, then

turn my hand to swing for Home Avenue so I'd make sure they all saw it.

Q. You did that?

A. Yes.

Q. You noticed automobiles then stopped on Home Avenue [fol. 65] one coming in a northerly direction toward the crossing, did you not?

A. Yes I looked at all four entranceways to the crossing.

Q. Also noticed automobiles coming in an easterly direction on Tallmadge stopped west of the crossing?

A. Yes sir.

Q. All those automobiles had their headlights lighted?

A. I do not know, in the winter time as a general rule—

Q. Let's confine ourselves to this occasion.

A. That I can't answer.

Q. Did you notice any lighted headlights on any of the automobiles which were headed north on Home Avenue at the crossing?

A. If I did I didn't pay attention to them.

Q. How about the first automobile in line, headed east, on Tallmadge, west of the crossing?

A. It was just an automobile as far as I was concerned. I didn't see anything different about him.

Q. Headlights lighted?

A. I couldn't say whether he did or didn't.

Q. You couldn't say?

A. No sir.

Q. Your deposition was taken, was it not?

A. It was, in your office.

Q. By a deposition, so the jury will understand, you were called as a witness, you were sworn by a Notary Public to tell the truth, and nothing but the truth?

A. That's right.

Q. And thereafter you were asked questions, and that deposition was taken on the 21st of May, 1956?

[fol. 66] A. Well, it was taken in your office, the only time I was in your office.

Q. It was just a few months ago?

A. Yes sir.

Q. And at that time you were asked, were you not, whether there were any lights, headlights of any automobile stopped on the west side of Tallmadge Avenue, that is west of the crossing, headed east?

A. It could have been asked. I don't remember.

Q. You don't remember?

A. I don't remember just—the lights were one thing I didn't pay any attention to, on automobiles.

Q. I am reading—

Mr. Roetzel: For your information, Mr. McGowan, page 28 of the transcript prepared by Thelma Selzer.

Q. To refresh your recollection upon the subject, Mr. Inman, do you remember of this question being asked of you at that time when your deposition was taken, and of your making this answer: "Question: Now were there cars standing west of the crossing on Tallmadge Avenue at this time? Answer: Yes sir." Do you remember that?

A. Yes sir.

Q. Then this question: "Did they have their headlights lighted? Answer: Yes." Do you remember making that answer?

A. I might have made that answer according to the time of the day that it was, but as far as knowing, those headlights were lit and bright or dim—

Q. You answered the question. Does that refresh your recollection, that the headlights were lighted?

A. No sir.

Q. All right. I'll ask this question, do you remember this question being asked of you, and making this answer: [fol. 67] "And were those headlights shining on you? Answer: No, the most of them were cut down to a dim or parking light." Do you remember making that answer?

A. Yes sir, I do.

Q. Well now at the time you made that answer you were telling the truth, were you not?

A. I was telling the truth, as far as, as close as I could.

Q. All right. Then this question: "I'm not talking about what most of them do but the first car in line on Tallmadge Avenue headed east and west of the crossing, did you notice

what kind of lights it had on? Answer: No I can't say that I did."

A. Yes sir.

Q. Question: "So that you don't know whether it had lights of such strength that it lighted your body as you stood there? Answer: Oh yes, if there's a light like that we try to get him to cut his lights down." You remember those questions being asked of you and you making those answers?

A. Yes sir.

Q. Now what are you saying now, did that first automobile headed east on Tallmadge, the first one west of the crossing have headlights on?

A. I couldn't tell you, and be honest with you, in any way.

Q. That answers my question. Thank you. You said something about street lights in your direct examination this morning. Where were the street lights located?

A. Well the one over on that particular side, on the west side of the tracks, located, I would say about thirty foot west of the railroad track.

Q. Which side of the street?

A. On the south side of Tallmadge Avenue.

[fol. 68] Q. I direct your attention to this photograph marked Plaintiff's Exhibit 11 which I think you have already examined and said it correctly portrayed conditions as they existed on January 2, 1952, and I'll ask you whether or not that shows a street light extending out on an arm from the telephone pole? (Handing Exhibit to witness.)

A. It's there, yes sir.

Q. And that light was there at that time and it was lighted on that night, was it not?

A. (Witness does not answer.)

Mr. Roetzel: Let the record show the witness is hesitating.

The Court: What is your answer?

A. Yes sir, it could be possible it was there.

Q. It could be possible?

The Court: Was it or wasn't it, to the best of your memory?

A. Yes sir.

Q. By "yes sir," you mean it was there?

A. Yes sir.

Q. As a lighted light?

A. That's right.

Q. Do you know what the candle power of that lamp was?

A. No I don't know.

Q. It had a shield over it which caused the rays to be thrown down?

A. It had a shield over it, but the shields were never cleaned on any of those kind of lights.

Q. I didn't ask you that question. Was there a shield over the light—

A. That's right.

[fol. 69] Q. —which caused the rays, such as they were, to be thrown down, not up?

A. I would judge they'd go that way.

Q. Now what other street light was there west of the crossing on Tallmadge Avenue, in the vicinity of the crossing?

A. On the west side?

Q. West of the crossing, on Tallmadge Avenue?

A. There were one, the same kind of lights were up close to the Pennsylvania track.

Q. Any on the north side of Tallmadge Avenue closer to the B & O crossing?

A. No sir.

Q. There were none?

A. No sir.

Q. That's your recollection?

A. That's right.

Q. Now what other street lights were there in that area, around the crossing at that time?

A. There were one over by the shanty, telephone pole that stood there by the corner of Albrecht's building and there was one at the corner of Home Avenue, on Home Avenue north of Tallmadge.

Q. And that was west of Home?

A. Yes.

Q. In other words, at what would be the northeast corner of the intersection—I mean northwest corner—my error—northwest corner, one on that pole?

A. Yes sir, there was one there.

Q. And then there was one on what would be the southeast corner, that would be over toward the Albrecht building?

A. There was one by the corner of Albrecht's building.

Q. How about the northeast corner?

A. On that I believe there was right by the bus stop.

[fol. 70] Q. To the best of your recollection all of those street lights were lighted on that night?

A. They were all supposed to be lit the same as other nights; whether they were, I can't answer that.

Q. You can't answer that?

A. No.

Q. All right. But as far as you know, they were lighted?

A. Yes sir.

Q. Now, as a matter of fact, you were standing in the rays of the light shown on this Exhibit 14, were you not, this light which is shown on Exhibit 11 (indicating), the rays of that lamp shown, showed your body?

A. That I couldn't say, I've seen a lot of lights where the reflectors was—

Mr. Roetzel: Object.

The Court: Sustained, strike it.

Q. Do I understand you to say you don't recall whether that light from that lamp shown on Exhibit 11 was sufficient to show your body there on the street?

A. That I couldn't say.

Q. Do you remember of giving a statement on the 22nd day of February to Mr. Spinelli who then was District Claim Agent for the B & O?

A. Yes, in the hospital.

Q. And you read the statement and signed it, did you not?

A. Yes sir.

Q. And do you recall this language in it, "This crossing was well lighted and I was standing in the rays of one of the City lights located on the southwest corner of the crossing." Do you remember that?

A. No sir.

Q. Well at the time you signed this statement you intended to state only those things which were true?

A. It was.

Q. Please answer my question.

Mr. Rootzel: Read the question.

(Thereupon the Court Reporter read the last question)

Q. Isn't that a fact?

The Court: Do you understand the question?

A. Yes.

Mr. Rootzel: Read the question again.

(Thereupon the Court Reporter again read the question)

A. That's right. I was giving him my position that I was in there at the track.

Q. To assist you in this matter—

(Mr. Rootzel hands paper to Mr. McGowan.)

Mr. McGowan: I have no objection to that statement.

Q. To assist you in the matter, I will let you look at the writing which I have just—

Mr. McGowan: You understand if you go into part of the statement I want the privilege of going into the entire statement.

The Court: You have that right.

Mr. Rootzel: I haven't any objection.

Mr. McGowan: I want the jury to have the entire statement.

Mr. Rootzel: I haven't any objection to them having the statement. I want a separation of witnesses. I notice there's a witness in here that's going to testify.

The Court: Are you going to testify?

(fol. 72) Gentleman in Rear of Court Room: I was called as a witness.

The Court: You step out in the hall. I'll order a separation of witnesses.

(Thereupon a separation of witnesses was had.)

(Mr. Rootzel hands paper to witness on stand.)

Q. You have read the entire statement now?

A. Yes.

Q. Having read it you notice the language in it, "This crossing was well lighted and I was standing in the rays of one of the City lights located on the southwest corner of the crossing." You notice that language?

A. That's the one at Tallmadge, I say that's right at the corner of Tallmadge and the circle that goes around to Home Avenue.

Q. It's the one which is shown on Exhibit 11, the one you pointed out before, right here? (Indicating on Exhibit.)

A. Yes.

Q. Now at the time you signed this statement, or after you signed this statement you notice you wrote the word "yes," after "have you read this statement"?

A. Yes.

Q. And "is it true and correct"?

A. Yes.

Q. Then you signed your name?

A. Yes.

Q. Taken on the 27th day of February, 1952, seven or eight weeks after you were injured. At the time you signed it you believed this statement was true, which I have just read to you, did you not?

A. As far as I could say, yes, sir.

Mr. McGowan: Mark the statement and have it introduced as an exhibit. Mark this Plaintiff's Exhibit 14.

[64.73] (Plaintiff's Exhibit 14 was marked.)

The Court: During the recess the Court charges you not to talk with anyone or allow anyone to talk with you or listen to any conversation pertaining to the subject matter of this trial, nor express nor form any opinion thereon until the case has been given you for final deliberation. Remembering that admonition you will be recessed for fifteen minutes.

RECESS

Cross-examination of plaintiff (continued).

By Mr. Roetzel:

Q. Mr. Inman, I am directing your attention now to a photograph which has been marked Plaintiff's Exhibit 10 concerning which you have already testified. I'll ask you if you notice the sign "Stop"?

A. Yes sir, one there and one there. (Indicating on Exhibit which was handed witness.)

Q. That was a City stop sign?

A. Yes sir, so was this one.

Q. Now this stop sign to which I am pointing is near to the conventional railroad crossing sign, railroad crossing, is it not?

A. Yes sir.

Q. And on that same standard which supports the railroad crossing sign there are also the flasher lights, dual flasher lights?

A. Yes sir.

Q. That stop sign was there on the 2nd of January, 1952?

A. Yes it was there quite a while before, yes sir.

Q. And that is because of your knowledge, to the best [fol. 74] of your knowledge, Tallmadge Avenue was a main thoroughfare, and it was the duty of vehicles coming on Home Avenue to stop before going to Tallmadge Avenue—

A. That's what they should have.

Q. If you will, please.

Mr. McGowan: Just a moment. The duty of the motorist, that's a matter of the law. Object.

The Court: Objection sustained.

Mr. Roetzel: Withdraw the question. The Court will take care of it.

Q. Now there was also another stop sign which you pointed to, which you can't read the word "stop," but you say that was a stop sign?

A. Yes sir.

Q. Which was right of the southeast corner of the intersection of Home and Tallmadge?

A. That's right.

Q. Now the shanty was located right about at the south-east corner also, was it not?

A. Yes sir.

Q. And where was the door on the shanty at that time, did it face the railroad and Home Avenue?

A. Right here. (Indicating.)

Q. It's right behind the stop, the flasher disk, isn't it, it's the dark space you see behind that light standard pole, is that correct?

A. Yes sir.

Q. All right. Now you testified about an amber light which was located on a pole and that pole was near that shanty, was it not?

A. It was, yes sir, the sidewalk a little strip of ground, then the sidewalk, and a couple of steps east was that pole.

Q. How close to the top of that pole do you estimate that [fol. 75] this amber light was located on the 2nd of January, 1952?

A. It was right close to the top of that pole.

Q. And did you at any time while that pole was there attempt to estimate the height of the pole?

A. No, I did not.

Q. If I were to say to you that that pole extended substantially twenty-five feet above the surface of the ground would you say that was correct or incorrect?

A. Well I would say it was close to correct, but I couldn't give you the amount of feet.

Q. Close to being correct. Now what is your height?

A. About—it's been a long time.

Q. What?

A. I'd say five-eight and a half, three quarters; or nine.

Q. Now let's go to another light which was located down toward Evans Avenue. I think you gave some testimony about that yesterday, did you not?

A. I did.

Q. And is that light about which you testified a part of what you call the railroad block system?

A. I would say it was.

Q. Now Evans Avenue is which direction from Tallmadge Avenue?

A. Towards Akron.

Q. That would be south, would it not?

A. Yes.

Q. Therefore, one standing on Tallmadge Avenue near the crossing, just west of the crossing, would look to his right in order to see this light concerning which you testified—

[fol. 76] A. Yes sir, with no obstructions between you you could see it.

Q. About how high above the level of the ground do you think that light was located?

A. I never was down there—I would say possibly the same height from the ground as the blinker light.

Q. As the amber light?

A. No, as the blinkers are at the crossing, whatever you would estimate that.

Q. How high do you think the blinkers are at the crossing, the blinker lights, above the ground?

A. Ten foot.

Q. So your estimation of the red light down near Evans Avenue and part of the block system is ten feet above the surface of the ground?

A. Close to it, that would be an estimate.

Q. As the surface of the ground where the light is located. This red light about which you're talking, is that higher or lower than the surface of the rail of the railroad track?

A. At the same point?

Q. At that point?

A. That I couldn't say, I never was down there, I can't see the rails, I couldn't see the rails from Tallmadge Avenue.

Q. How far is it away in feet from Tallmadge Avenue, approximately?

Mr. McGowan: To where?

Mr. Roetzel: The red light.

A. Evans Avenue light, you mean?

Q. The light we're talking about, how far is that from Tallmadge Avenue?

A. I couldn't estimate that.

[fol. 77] Q. How then are you able to estimate this height above the ground?

A. Because it's about the same as the flasher lights.

Q. Now that light was at—or in close proximity to the interchange between the B & O and the Pennsylvania Railroad Company?

A. That's the way I understand it, the B & O came on to the Pennsy's tracks close to where that light was.

Q. Now that light was lighted by electricity?

A. I can't say, I suppose so.

Q. Well do you know or don't you know that the block circuit, the block system is controlled by electricity and the lights are lighted by electric current?

A. Yes.

Q. And this was part of the block system?

A. Yes.

Q. Now that light would be amber at times and red at times, would it not?

A. I would say that that light was amber when the cross-over, when it was eligible for the B & O to cross over to the Pennsy tracks and when there was something blocking the Pennsylvania tracks it would be red for the one engineer.

Q. It was amber part of the time and red part of the time?

A. That's right.

Q. It was amber during those portions of time when there was no westbound B & O train inside the circuit?

A. No it was out, it wasn't even lit.

Q. It wouldn't be lighted at all?

A. No.

Q. So that there would be times it wouldn't be lighted at all?

[fol. 78] A. That's right.

Q. But at the time when there would be a crossover between the Pennsylvania and the B & O then it would be amber, is that what you testified to?

A. If the B and O was making the crossover and the Pennsylvania track was clear it would be amber.

Q. But if a train, a westbound train on the B & O came into the circuit—

A. Yes sir.

Q. —which you have estimated as being about 4,000

feet east of the crossing, Tallmadge Avenue crossing, whenever that happened then that light would light red?

A. No, it would light either red or orange, depending on the situation down on the Pennsylvania tracks.

Q. I see.

A. It would light either orange or red. If it lit red then the westbound train had to stay on that circuit up there, before it could go down, if he had a long enough train that would block Tallmadge Avenue crossing.

Q. Well now did it always turn red when there was a B & O train inside of the circuit coming west?

A. No sir, because sometimes they go down and right straight through, if they have a clear signal to go on.

Q. I see. Would the light, would it always light some color when a B & O train coming from the east came inside the circuit?

A. Yes, one way or the other.

Q. So when it was lighted, whether red or amber or orange, according to your recollection, you knew that there was a westbound train on the B & O tracks, westbound track inside the circuit?

A. Yes sir.

[Vol. 79] Q. Now did you see the caboose of this eastbound train on this night you were hit?

A. I just got a glimpse of it when I turned my head from looking north to see if I could see the reflection of the Detroit Steel coming on. I couldn't tell by the circuit because it lit.

Q. You said you got a glimpse of it. Where was it when you got the glimpse of it?

A. I would say on the crossing by about ten to fifteen feet.

Q. It was ten to fifteen feet on the crossing moving north?

A. Going east, that's north according to out there, but it's still east on the railroad.

Q. By "on the crossing," you mean on the paved portion of Home Avenue?

A. Where the railroad company had the tracks built up for traffic to go across.

Q. That's what I mean, for vehicles to cross?

A. Yes sir.

Q. It was ten feet on that, moving north?

A. I'd say about ten foot, yes sir.

Q. And that's the last you recall of seeing it?

A. Yes sir, I was just—

Q. You answered that. You say "yes"?

A. Yes sir.

Q. And you had not seen it before that time?

A. I had seen it coming up the track.

Q. You had?

A. Yes sir, but it was in no immediate danger of the crossing. I had to—

Q. Wait. Just answer my questions. Now when before the time that you last saw it, when it was ten feet on the [fol. 80] crossing did you last see it, when before that time did you see it?

A. I would say a hundred foot down the track.

Q. A hundred feet down the track?

A. Yes sir.

Q. And it was moving then, of course?

A. Yes sir.

Q. Now there was nothing behind that caboose on the eastbound track, was there?

A. Nothing that I know of.

Q. That you saw?

A. That I saw, yes sir.

Q. As far as you know there was nothing behind it on the track?

A. Yes sir.

Q. As far as Evans Avenue?

A. As far as I could see.

Q. Did you see the automobile that hit you?

A. I did not, no sir.

Q. Did you start to walk from the position you had been in as you testified here, did you take any steps before you were struck?

A. I started to move my right leg was the only one.

Q. Pardon?

A. I made a move with my right leg, just a kind of a turn step.

Q. Of your right foot?

A. Of my right foot, yes sir.

Q. But your left foot had not moved from the position you were in at the time you were signalling, is that correct?

A. That's right.

Q. Now did you have a definite recollection of this now, you said you were rendered unconscious?

A. I was.

Q. Do you say to this jury you have a definite recollection [fol. 81] of what you did immediately before you were struck?

A. Yes sir, yes sir.

Q. Isn't it a fact, isn't it a fact, Mr. Inman, that you actually walked down almost as far as the south curb of Tallmadge Avenue?

A. No sir.

Q. In the general direction of the shanty, before you were hit?

A. No sir.

Q. You say that's—

A. If I had been down there—

Q. Wait. You say that's untrue?

A. Yes sir.

Q. You remember of someone coming up to you after you were hit, after you had been struck?

A. After I came to?

Q. After you had been hit by the automobile?

A. I had been hit, knocked unconscious, when I came to I saw a man.

Q. You remember of someone coming up to you and saying you were hit by an automobile, and you said "no, I fell."

A. No.

Q. You don't remember that?

A. No.

Q. Would you say you didn't make that statement?

A. I said I did not remember, I only remember one man.

Q. I think you said on direct examination this Detroit Steel train which was the one you knew was out at Ravenna passed the crossing just about the time you were being placed in the ambulance?

A. That's right.

Q. Are you able to estimate the time?

A. No, I don't know how long I was unconscious.

[fol. 82] Q. You do remember after you regained consciousness of being at the crossing sometime before the ambulance arrived?

A. I don't know how long I was there, I have no time on that, I know about what time I got hit and that's about all I know.

Q. Could you give the jury any estimation of the time you were at the crossing until the time you regained consciousness, up to the time the ambulance came, whether one minute, two minutes?

A. I'm afraid not.

Q. You had no duty to flag the crossing for highway traffic except when trains were approaching the crossing?

A. That's correct.

Mr. Roetzel: I think that's all.

Redirect examination.

By Mr. McGowan:

Q. Then after the train passed what were your duties?

A. Step back out of the road and let traffic go.

Q. How would you let traffic go?

A. Walk to the nearest curb, if I was on the west side I stood there and waited until it was clear that there was nobody making left hand turns coming from the east that I was in any danger going across because I could see my lights.

Q. Would you give a signal for traffic to proceed across with your lantern?

A. No, it wasn't necessary.

Q. You said in answer to one of Mr. Roetzel's questions, you couldn't see the circuit at Evans Avenue.

Mr. Roetzel: I didn't ask him that question. You asked him that.

Mr. McGowan: You stopped him and said you didn't ask [fol. 83] him why he couldn't see it.

Q. You said in answer to one of Mr. Roetzel's questions you couldn't see the circuit at Evans Avenue?

A. That's right.

Q. Why can't you see it?

A. When an eastbound train is coming until it gets up a certain distance to the crossing, the caboose—

Q. What is that distance?

A. I'd say thirty, forty foot.

Q. And then you look, do you, to your right down to Evans Avenue, to look at that circuit?

A. Always look at it before you open up for traffic.

Mr. McGowan: That's all.

Recross examination.

By Mr. Roetzel:

Q. As a matter of fact, he didn't state on my examination anything about whether he could or couldn't see. That was direct. In lieu of this, I want to ask something, do you say to this jury, Mr. Inman, that a person standing as you were on Tallmadge Avenue, several feet west of the westerly rail of the westbound main track, could not see that signal down at Evans Avenue when there was a train or any other car forty feet or more from the crossing?

A. I do in this respect, you said "how many feet away from the westbound tracks"?

Q. Well you said you were standing how many feet away from the crossing?

A. Not over two feet from the rail.

Q. All right, we'll take two feet. You say that you were standing two feet west of the westbound, of the west rail, of the westbound track and approximately the middle of [fol. 84] Tallmadge Avenue?

A. That's right.

Q. And you could not see that signal at Evans Avenue by looking to your right if a train or a car was on the eastbound main track, a distance of forty feet south of the crossing?

A. That was the estimate I made, yes sir.

Q. Don't you know that it's much more than that, just think about it a minute.

A. I don't believe it is.

Q. Pardon?

A. I don't think it is, to be honest. I never measured it, never stepped it off, or nothing like that.

Q. All right.

Mr. Roetzel: That's all.

Mr. McGowan: It was your duty to look to the right, was it?

A. It was.

Mr. McGowan: I think that's all.

Recross examination.

By Mr. Roetzel:

Q. One more question, as far as you know, that block signal, the red light is in the same location now as it was on January 2nd, 1952?

A. The one located where?

Q. The one you have been testifying about, that you couldn't see. That hasn't been changed?

A. At Evans Avenue?

Q. Yes.

A. I can't tell you what changes have been made down there since I've been hurt.

Q. I think you said the railroad tracks are in the same position as they were on January 2nd, 1952?

A. Yes, around the crossing, yes sir, I did.

Mr. Roetzel: That's all.

[fol. 85]. Thereupon in order to further maintain the issues on his part, the Plaintiff called as his next witness SAM BAILEY who, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McGowan:

Q. Tell the Court and jury your name?

A. Sam, Bailey.

Q. Where do you live?

A. 1600 Briding Road.

Q. Are you married or single?

A. Single.

Q. Your employment?

A. At the present time I'm working for the Adamson Machine.

Q. And how long have you been working for the Adamson Machine?

A. About four months.

Q. Back in January of 1952, on the night of the 2nd day of January, 1952, did you own an automobile?

A. Yes.

Q. Were you driving that automobile or did you have occasion to drive that automobile on Tallmadge Avenue here in the City of Akron?

A. Yes.

Q. Did you have occasion while driving that automobile to pull up to the intersection of what is known as Beddes Corners and the railroad tracks at that intersection?

A. Yes sir.

Q. What time of the night was it, if you remember?

A. As near as I remember it was around midnight, it was near midnight.

Q. Were you alone or was someone with you?

A. I was alone.

[fol. 86] Q. When you brought your car—I take it you brought your car to a stop because there was a train passing?

A. A train on the crossing.

Q. Which direction was that train moving?

A. Well it was going north there but it's an eastbound train.

Q. Where did you bring your car to a stop with reference to the westbound tracks of the B & O Railroad?

A. Well I was first in line there.

Q. First in line going east?

A. Right at the intersection, yes.

Q. With reference to the arcaway that extended from Tallmadge Avenue to Home Avenue where you were, where were you with reference to that intersection?

A. Let's see, I don't quite get it.

Q. If you come down here, Mr. Bailey. (Witness steps down.) This is Tallmadge Avenue, this is Home Avenue, this is east and this is north, this is north and this is south. (Indicating.) You're familiar with East Tallmadge Avenue?

A. Yes.

Q. Been over there many times?

A. Yes.

Q. Are you familiar with this paved strip that was in existence at that time?

A. Yes.

Q. Where did you bring your car to a stop when you brought it to a stop, with reference to this areaway on Home Avenue?

A. I was right here. (Indicating.)

Q. You were west of it?

A. I was at the signal on Tallmadge.

Mr. Roetzel: The witness indicates the red portion of [fol. 87] the map immediately under the word "Tallmadge."

A. That's the intersection here, I was first in line. (Indicating.)

Q. And did you have your headlights burning at that time, Mr. Bailey?

A. I did.

Q. Bright or dim?

A. Driving light, dim light.

Q. Now then while you were there, did you see an accident that took place there that evening, or part of an accident?

A. I did.

Q. Before that did you see a watchman there that night on duty?

A. He was directly in front of me.

Q. Where was he standing with reference to the west tracks of the B & O Railroad, that is I mean the extremely westerly set of tracks, that would be the eastbound or the westbound tracks, where was he standing?

A. Standing near the middle of the intersection, near the middle of Tallmadge Avenue on the west side of the track.

Q. West of the tracks?

A. Yes.

Q. How far west of the tracks would you estimate he was standing, approximately?

A. He was standing clear of the tracks.

Q. In fact, could you give us your best judgment on it, or wouldn't you care to?

A. I better not say.

Q. Which way was he facing?

A. He was facing the train when I pulled up.

Q. Did you notice whether he had anything in his hands?

A. His signal lights.

Q. Lanterns?

A. Yes.

[fol. 88] Q. One in each hand, do you remember?

A. I can't say on that.

Q. Now then you just tell us what you saw happen there that night while you were there?

A. I had stopped for the train and the train was just about to clear the crossing. I believe the cab was coming over the crossing at the time. This car, like a lot of them I seen there, jumping the gun, seen the tail end of the train coming up went around the cars, this car came around several cars that was on Home Avenue and turned west on Tallmadge Avenue and hit the watchman.

Q. Did you see what position the watchman was in, which way he was facing when he was hit?

A. I can't say on that.

Q. Was he standing still or was he walking?

A. He was standing still when he was hit.

Q. Had he turned around at any time, did you notice him turn around at any time?

A. I don't know, usually the watchmen I've seen there are looking in all directions.

Q. Do you have any particular recollection of him changing his position?

A. No.

Q. What happened to him then when this car hit him?

A. It threw him to the pavement. Naturally, I jumped out of the car and this car that hit him, going west, turned the lights out and kept going, speeded up. I couldn't see the

license or nothing; because the headlights behind me hit my eyes.

Q. Where was Mr. Inman lying when you got out of your car?

A. Just about to the curb at the intersection, it knocked him down.

[fol. 89] Q. Which curb do you refer to?

A. (Witness goes to map.) He was lying there. (Indicating on map.) He was standing at the intersection and it knocked him around. He was standing out here and it spun him around and it knocked him more to the curb here. (Indicating.)

Q. Did you remain there until the ambulance arrived?

A. Yes.

Q. Was he moved, before the ambulance arrived, from his position?

A. No.

Mr. McGowan: That's all.

Cross examination.

By Mr. Roetzel:

Q. Mr. Bailey, were there flasher lights at this crossing, on the west side of the crossing, and the south side of Tallmadge Avenue?

A. Yes sir.

Q. Were those flasher lights working? In other words, were they flickering?

A. Oh yes.

Q. You stopped, with your driving lights on, and I assume you were facing straight ahead on Tallmadge Avenue?

A. Yes.

Q. And you said the watchman was directly ahead of you?

A. Yes.

Q. You also said he had signal lights in his hands. Do you remember now that he had a red lantern in his right hand and a green lantern in his left hand?

A. I can't say what hand he had lights but he had his lanterns.

Q. Well, of course, this happened five years and about—I mean four years and about eight months ago. Do you remember of giving a statement to Mr. Spinelli of the [fol. 90] B & O Railroad on the day after this accident?

A. I know there was someone out to the house.

Q. And you gave a statement that was written out and you signed it, do you remember that?

A. Yes.

Q. And at that time your recollection was pretty fresh as to what happened the night before?

A. Well, sure.

Q. I'm going to hand you this statement which I will have marked Defendant's Exhibit A.

(Defendant's Exhibit A was marked.)

Mr. McGowan: May I see it?

(Mr. Roetzel hands paper to Mr. McGowan.)

Q. If you will take the statement, please, and read it to yourself. (Handing paper to witness.)

Q. You have read the statement?

A. Yes.

Q. And this signature there, "Sam H. Bailey," is that your signature? (Indicating.)

A. Yes it is.

Q. Did you write the word "Yes" after this question: "Have you read this statement?" Answer: "Yes." Did you write the word "Yes"?

A. Yes I did.

Q. That is your signature?

A. Yes.

Q. Then "Is it true and correct," and the word "Yes" you wrote in, is that correct?

A. Yes.

Q. At the time you gave this statement whatever was in it was your recollection of what happened at that time?

A. Yes.

Q. Having read it, is your recollection now refreshed by the fact that the man—where it says here, "He had a green [fol. 91] lantern in his left hand and a red lantern in his right hand"? Do you remember that?

A. I know he had his lanterns in his hands, it's been so long ago I don't remember.

Q. Even having read there, you don't remember?

A. I can't remember, it's been a long time ago.

Q. That's right, it's nearly five years. No one is criticizing you. We're just trying to bring out the facts.

A. Yes.

Q. At that time, whatever you wrote here, or was written, you believed at that time it was correctly stated, that was your recollection at that time?

A. Yes.

Q. All right. Now do you notice this language also, "After the caboose of the northbound train passed, the crossing watchman began to walk toward his shanty walking in a southeasterly direction but was struck by this Plymouth Sedan when he was on the running track and near the curbline, although I do not think there is a walk over the crossing." Now having read that, does that refresh your recollection that that is what Mr. Inman was doing?

A. I remember—as much as I can remember, the caboose was just going over the crossing at the time he was hit.

Q. Does it refresh your recollection, "After the caboose went over the crossing, the crossing watchman began to walk toward his shanty walking in a southeasterly direction but was struck by this Plymouth Sedan when he was on the running track and near the curbline, although I do not think there is a walk over the crossing." Does that refresh your recollection on that subject?

A. That must have been right.

[fol. 92] Q. That must have been right or you wouldn't have put it there?

A. That's right.

Q. In other words, that was the day after the accident? Your recollection then was fresh and what is here must have been right or you wouldn't have signed it?

A. That's right, at that time.

Q. Now this Plymouth pulled out of a line of traffic which was headed north on Home Avenue, is that correct?

A. Yes sir.

Q. Now for your information, and help, Mr. Bailey, we have here some photographs, one which we call Plaintiff's Exhibit 10. I don't know if you recognize that, or not, as

being a photograph which shows it's taken on Home Avenue facing north? (Handing Exhibit to witness.)

A. Yes.

Q. You recognize that?

A. Yes.

Q. You're sufficiently familiar with it?

A. Yes.

Q. And that shows, of course, the center line in Home Avenue, does it not?

A. Well, it's divided.

Q. Actually it's far between the sections of the concrete pavement, isn't that correct?

A. That's correct.

Q. And you remember there was a concrete pavement on Home Avenue at that time?

A. Yes.

Q. At any rate, that's substantially in the middle of the pavement, the line that runs up from the bottom of the photograph? (Indicating.)

A. That's correct.

Q. This traffic you're talking about which was headed north was standing back of this blinker signal and this stop sign, wasn't it?

A. Yes.

[fol. 93] Q. And this car that pulled out of line, he pulled out behind two cars which were standing there and still waiting and hadn't started to move?

A. Yes, several cars, and he cut out in front of all of them.

Q. And he cut out—and did you use the word "Gunning" it?

A. Jumping the gun.

Q. Isn't it a fact you had actually started your car and had to stop quickly in order to avoid collision with him?

A. That's possible, this being a grade here, I hadn't entered into the intersection, the watchman was really out there. (Indicating.)

Q. In other words, he cut and made a sharp left turn to the left of the railroad tracks, and cut in front of you and hit Mr. Inman?

A. That's right.

Q. Do you know what part of his car hit Mr. Inman?

A. No I couldn't say.

Q. The force of the collision was such as to throw Mr. Inman over on the westbound track that being the most westerly track?

A. He was laying off the track,—

Q. He was lying off the track?

Mr. McGowan: Finish your answer.

Mr. Roetzel: Don't let me interrupt you.

Q. You said he was lying off the track, I think you did point over on this Exhibit, the map, you did point out a place over here some place, didn't you? (Indicating.)

A. As much as I can remember, he was lying to the right in front of my car, that is to the intersection.

Q. The front of your car to the right?

A. Yes.

[fol. 94] Q. Your car was to the right of the middle line of Tallmadge Avenue?

A. Yes.

Q. That was after he was hit and was down on the pavement?

A. Yes.

Q. Now this car didn't stop, just continued to go?

A. That's right, he turned his lights out.

Q. Now to refresh your recollection on whether you were moving or not, I wish to call your attention to this part of the statement, "I had to make a quick stop or the driver may have damaged the front of my automobile." Do you remember that now?

A. It could have been, letting it drift ahead, there's a grade there, I hadn't really put it in gear to advance on across the tracks.

Q. All right. Now these flashers were working at the time?

A. Oh yes.

Q. The flasher lights were still working?

A. Yes.

Q. Now the lighting was sufficient so you had no difficulty in seeing these various things happen, did you?

A. No, right at the intersection all the headlights were on, it was right in front line of traffic.

The Court: Keep your voice up. Talk to the Jury.

Q. And here you do say, "My headlights were focused on the watchman."

A. That's right.

Q. That is correct? Now you did secure the license number of the automobile and turned it over to the Police Department?

A. No I don't believe—I read that—I don't see how that got in—no one got the license number of the car.

[fol. 95] Q. Did you stay until the ambulance arrived?

A. Yes.

Q. That was about ten or fifteen minutes after he was hit?

A. I don't know the time.

Q. Maybe I can help you again here. It says here, "Ambulance arrived in about ten or fifteen minutes."

A. I remember it was some time because it was kind of cold and I didn't have a coat or anything with me at the time, and I got pretty cold standing around.

Q. And then there's this statement, "The caboose was about 150 feet clear of the crossing when the accident took place."

A. I remember the train was at, you know, the end of train was going over the crossing. I don't remember that part of it now. I'm telling you as I try to remember how it was.

Q. That was your statement at that time on the day afterwards. As a matter of fact, the watchman had given the signal to your Tallmadge Avenue traffic to proceed and you had started to let your car drift, had it not?

A. Well I don't think he did, because he was still out in the intersection, at that time of the night I don't believe he'd stand out there and give the traffic the signal to go ahead.

Q. Did you know anything about another train coming in the opposite direction?

A. No I didn't.

Q. Now let me read this sentence to you also: "The crossing watchman had his back to Home Avenue traffic and had signalled Tallmadge traffic ahead." Does that re-

fresh your recollection of the fact that he had given the signal?

[fol. 96] A. No I won't say, it's been so long ago I can't remember.

Q. Would you say, however, that this statement was correct as to your recollection at that time?

A. Yes, it should be.

Q. Correct as to your recollection on the day after?

A. Yes.

Mr. Roetzel: That's all.

Redirect examination.

By Mr. McGowan:

Q. Mr. Bailey, when Mr. Inman was knocked down he wasn't changed from that position until the ambulance arrived, to your knowledge?

A. No, he was covered up, someone put something on him.

Q. And it was from that place he was put in an ambulance and removed from the scene?

A. That's right.

Mr. Roetzel: By the way, did you know Mr. Inman previously?

A. No.

Mr. Roetzel: You work at Adamson's Machine, and he testified he worked there.

The Court: During the noon recess the Court charges you not to talk to anyone or allow anyone to talk with you, nor express nor form an opinion thereon until the case has been given to you for final deliberation. Remembering that admonition you will be recessed to convene at 1:15.

Thereupon the Court adjourned until 1:15 o'clock P.M. on said day, at which time court convened pursuant to adjournment and said trial proceeded as follows:

[fol. 97] Mr. Roetzel: I have an Exhibit which I wish to offer in connection with the cross examination of the last witness.

The Court: Any objection, Mr. McGowan?

Mr. McGowan: Yes, I don't believe it was marked during the time he was a witness.

Mr. Roetzel: Yes it was. I had it marked.

The Court: I thought he referred to it.

Mr. Roetzel: Yes I identified it before I even started to interrogate him.

Mr. McGowan: We'll reserve an objection at this time subject to permitting us to withdraw our objection.

OFFERS IN EVIDENCE

Mr. Roetzel: I offer Defendant's Exhibit A.

The Court: It may be admitted. Proceed.

* * * * *

[fol. 98]

* * * * *

Mr. McGowan: We'll offer Plaintiff's Exhibit 14.

Mr. Roetzel: No objection.

The Court: May be admitted.

(Plaintiff's Exhibit 14, Statement, was admitted.)

Mr. Roetzel: Now the Defendant offers Defendant's Exhibit A which was used in connection with the cross examination of the Plaintiff's witness, Sam Bailey.

Mr. McGowan: Object.

The Court: Overruled. May be admitted.

Mr. McGowan: Except.

(Defendant's Exhibit A, Statement, was admitted.)

* * * * *

[fol. 99] CARL C. INMAN who, having been previously sworn, testified as follows:

Recross examination.

By Mr. Roetzel:

Q. Mr. Inman, just a few questions I wish to ask you. You have spoken in your direct examination and in your

cross examination, of the train which you called the Detroit Steel train?

A. Yes sir.

Q. Why did you refer to it as the Detroit Steel train?

A. Because that was the name I heard over the speaker, over our listener in the shanty when he gave the number of the engine.

Q. That was a freight train?

A. Yes sir.

Q. Now that train as it approached the Tallmadge Avenue crossing coming as it did from the east, the direction of Ravenna, would whistle before it arrived at the crossing?

A. I imagine it would.

Q. You know from experience that trains do whistle at crossings?

A. Providing there's nothing wrong with the whistle. I've seen trains where the whistle was gone.

Q. Assuming there was nothing wrong with the whistle that whistle would be sounded at a distance of 1500 feet from the crossing, it was started at that distance?

A. I can't say.

Q. You were there six years?

A. 1500 feet. If it were marked I'd know where the whistle would start blowing.

Q. You know what is known as a whistling post?

A. Yes.

Q. You do know there was a whistling post toward [fol. 100] Cuyahoga Falls?

A. As far as that crossing I never was up above there only to flag trains and I couldn't say I saw a whistling post.

Q. You never went up that far?

A. No sir.

Q. But you do know from your experience that the locomotive as it approaches a crossing, whether it be coming north or coming south, starts to sound its whistle at a certain distance from the crossing?

A. Yes sir.

Q. And you do know that's about 1500 feet, don't you?

A. Well it's before they get to the crossing; 1500 feet. I couldn't tell you where that would be.

Q. Now that crossing whistle is a long—

A. What?

Q. What does the crossing whistle sound like, how many blasts of the whistle?

A. That depends on the engineer, I think.

Q. You mean to say—you don't know what a crossing whistle sounds like?

Mr. McGowan: Object, you asked him how many times it blows.

Mr. Roetzels: That's right.

Q. How many short blasts; how many long blasts are there?

A. It's been five years ago since I left there.

Q. Don't you remember—

A. I'd say two short blasts.

Q. Don't you remember two long blasts, a short blast and then a long blast?

A. I wouldn't exactly answer, I couldn't exactly answer that.

[fol. 101] Q. You also know the locomotive as it approaches the crossing, gets somewhere near the crossing, again sounds its whistle?

A. Yes sir, and rings its bell, as a general rule.

Q. And rings a bell, as a general rule. All right. Now this train which was moving in an easterly direction, the freight train on the eastbound main, at what point would the flasher lights on Tallmadge Avenue and Home Avenue cease to flash?

A. That's just after the caboose got east of the crossing.

Q. Just after the caboose passed over the crossing the flasher lights would discontinue flashing?

A. I would say mebbe fifty foot.

Q. Fifty feet?

A. That's approximately.

Q. Then if those flasher lights stopped flashing at that time you'd know there was no other train coming from the east?

A. You'd know there was no other train on the circuit either direction.

Q. Either east or west?

A. Right.

Q. Now you were in the crossing at the position you have told the jury?

A. Yes sir.

Q. With traffic stopped on Tallmadge Avenue facing east, and did you see any traffic yourself facing west on Tallmadge Avenue?

A. Facing west?

Q. West?

A. I couldn't look after the caboose went by.

Q. You didn't see the automobile of Mr. Catanese who appeared here as a witness yesterday?

A. The first time I saw him—no sir.

[fol. 102] Q. Also said you saw traffic on Home Avenue heading north?

A. That was on the south side of the tracks.

Q. That's right.

A. That's right.

Q. On Home Avenue south of the crossing?

A. Yes sir.

Q. Did you see at any time any traffic headed south on Home Avenue north of the crossing?

A. No sir.

Q. Now if that flasher light had ceased to operate when the caboose got, you say fifty feet north of the crossing, what would you have done if you'd have followed your normal course of procedure?

A. After seeing the light, looking at the light at Evans Avenue, seeing it was out, not lit at all, I would have walked over to the curb and waited to get an opportunity to go to the shanty.

Q. By "the curb," you mean the south curb of Tallmadge Avenue?

A. Yes sir.

Mr. Roetzel: That's all. Thank you.

Mr. McGowan: The Plaintiff rests.

* * * * *

[fol. 103] CHARLES FREDERICK FEATHERS who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Roetzel:

Q. Your name is Fred Feathers?

A. Charles Frederick Feathers.

Q. Where do you live?

A. Parkersburg, West Virginia.

Q. Where were you living on January 2nd, 1952?

A. I was living in Ravenna.

Q. Are you single or married?

A. Married.

Q. And by whom are you employed?

A. Weather Seal, Inc.

Q. How long have you been employed by Weather Seal, Inc.?

A. Since 1949. That is until one period of time that I left the Company and then returned.

Q. When was that?

A. From about the middle of 1952 until October of 1953.

Q. Now are you still employed by Weather Seal?

A. Oh yes.

Q. Where are you employed?

A. I work in Parkersburg.

[fol. 104] Q. What is the nature of your work for Weather Seal there?

A. I'm responsible for sales, I'm the sales manager.

Q. In that office of Weather Seal?

A. That's right.

Q. How long have you been located there?

A. I was transferred to the territory which includes Marietta and Parkersburg on the 21st of March of this year and in July of this year we moved our office over to Parkersburg. It formerly was in Marietta.

Q. Up to the 21st of March where did you perform your duties?

A. In and around Akron.

Q. Weather Seal has an office where in Akron?

A. 813 East Market Street.

Q. Akron?

A. That's right.

Q. Now when you talk, Mr. Feathers, will you talk loudly enough so the last lady in the jury box will be sure to hear you.

A. Can you hear me now?

Q. On the morning, early morning of the 2nd of January, 1952, tell the jury whether or not you were at the Tallmadge Avenue—Home Avenue crossing of the B & O Railroad?

A. I can't swear to the date, I can't swear to the time; I saw the accident that I've been called in to testify about.

Q. You mean the accident in which Mr. Inman was struck at that crossing, the crossing watchman?

A. I saw a crossing watchman, I don't know who he was, I saw him get—

Q. Did you see the car which struck that watchman before the watchman was struck?

A. I did.

Q. Where did you first see that car?

[fol. 105] A. The first occasion I had was at the railroad crossing on Arlington Street up near Forge Street.

Q. And tell the jury what happened there?

A. Well of course the same train that was going past the crossing at Home and Tallmadge was going past the Arlington Street crossing there, and as I approached the crossing I slowed my car to a stop—do you want me to continue?

Q. Yes. Let me interrupt you. Were you alone or was there someone with you?

A. My wife and oldest son were with me.

Q. And what direction were you headed?

A. Headed north.

Q. On what street?

A. Arlington Street.

Q. Now does Arlington Street intersect or run into Home Avenue?

A. Yes, yes.

Q. And what direction then would you have been with reference to the Tallmadge Avenue, Home Avenue cross-

ing, what direction were you from that at the time you stopped?

A. I was approximately a mile south, the first incident I had.

Q. You say you stopped there. While you were standing there what, if anything, happened?

A. The first occasion happened before I stopped. As I approached the stop this fellow who I understand is in the case here, pulled right around me on my left hand side and pulled his car in ahead of mine and caused me to have to swerve my car off the road to avoid hitting me because he cut in front of me in the path I was following.

Q. Did you thereafter, while standing still, did you get [fol. 106] out of your car?

A. I did.

Q. Did he get out of his car?

A. Yes.

Q. How close did you get to him?

A. I had my hands on him.

Q. You may tell the jury whether you smelled his breath?

A. Oh yes, yes.

Q. What did you observe?

A. As far as his breath was concerned?

Q. Yes.

A. Pretty heavily laden with alcohol, unless I'm mistaken.

Mr. McGowan: Who are you referring to?

Mr. Roetzel: Mr. Ball. I'll follow right down. The man who hit Mr. Inman.

By Mr. Roetzel:

Q. What, if anything else, did you observe about his movements of his body?

A. His movements, his entire attitude would indicate that of one who was under the influence of alcohol to quite an extensive degree.

Mr. McGowan: Where is this he saw him?

Mr. Roetzel: About a mile south. This same train passed the crossing about a mile south and then they both came up to this crossing where the accident happened.

A. Yes.

Q. Now what did the man do then, did he get back into his car?

A. Yes, in a couple of minutes he did.

Q. And after the train passed over the crossing what did you see become of the automobile in which this man was riding?

Mr. McGowan: Just a moment. I object to anything [fol. 107] that happened—

The Court: Sustained, strike it, disregard it, jury. In the first place this man hasn't been qualified.

Mr. Roetzel: Yes he has.

The Court: How has he been qualified?

Mr. Roetzel: He was up close to him, smelled his breath.

The Court: It still isn't a qualification to smell his breath, whether or not one has a breath of alcohol.

Mr. Roetzel: He also noticed his demeanor and actions.

The Court: He'll have to be qualified in order to testify.

Mr. Roetzel: You mean as an expert?

The Court: Not as an expert, by reason of his experience.

Mr. Roetzel: I'll ask him this question—

Q. Had you ever before this time detected the odor or alcohol on anybody's breath before the time of this occurrence at Arlington Street?

A. Had I ever smelled an alcohol laden breath before that time?

Q. Yes.

A. Absolutely.

Q. Had you seen a person whose breath smelled of alcohol, had you seen him partake of any alcohol drink? Do you understand?

A. In other words, had I seen one drink alcohol and then smell it directly afterward and connect the two together?

Q. Yes.

A. Absolutely.

[fol. 108] Q. Now had you ever before this time seen any person either standing or walking who had been drinking alcohol?

A. Certainly.

Q. Did you see this man walk after he got out of his car at that Arlington Street crossing?

A. Yes.

Q. And had you ever seen a person walk before this time who was under the influence of alcohol?

A. Absolutely.

Q. Now tell the jury what you observed about the walking of this man at the Arlington Street crossing?

A. Well should I recite the entire happenings at that particular crossing?

The Court: No.

Q. Just what you saw about his walking, what did you notice?

A. His walk was not steady, his equilibrium was anything but perfect. He definitely indicated that he was under the influence of alcohol by his walk, by his talk, and by the smell of his breath. Does that answer your question, sir?

Q. I think it does. Now did this car, when this man got back in the car, did he get into the driver's seat?

A. Yes. ●

Q. Was there anybody else in the automobile with him?

A. Not that I could see.

Q. And what direction did that car take after he left Arlington Street?

A. Left Arlington and turned on Home Avenue and followed Home Avenue up to the crossing on Home.

Q. Did you follow that car?

[fol. 109] A. Yes I was behind it.

Q. Did you see that car at the Home Avenue, Tallmadge Avenue, crossing?

A. Yes.

Q. And tell the jury whether or not it stopped?

A. He stopped right behind the car ahead of him, right in traffic because the train was crossing the crossing.

Q. Was that south, south of the crossing on Home Avenue?

A. That's right.

Q. What side of the street did he stop?

A. On the proper side.

Mr. McGowan: Ask that go out.

The Court: Strike it, disregard it, jury.

Q. With reference to being the right or left?

A. Right side.

Q. Any cars ahead of it?

A. If you'll pardon this interjection here—

The Court: No, you answer the question.

Mr. Roetzel: Read the question.

(Thereupon the Court Reporter read the last question.)

A. Yes.

Q. Can you give the jury your recollection of the number of cars ahead of the car when it stopped?

A. A few, that's the best I can answer, I don't know whether two, three, four, five, but I would estimate three cars, to the best of my memory.

Q. Now where did you stop with reference to this car?

A. I think I was two cars behind him, one or two cars behind him.

[fol. 110] Q. Now when you stopped, tell the jury whether you noticed any flasher lights there at that crossing?

A. Yes I'm quite sure of that because it caused me to slow my car down.

Q. Were the flasher lights blinking?

A. To the best of my recollection they were.

Q. Do you remember how long you were there?

A. Possibly a minute, or two minutes.

Q. About how long did it take you to move from the Arlington Street crossing up to this crossing at Home Avenue and Tallmadge?

A. I would say, I would estimate three minutes.

Q. Did you come directly from Arlington Street crossing to the Home Avenue crossing?

A. That's right, I did.

Q. Now was the train on this crossing at the time you arrived there?

A. Yes.

Q. And about how long did you remain there, standing still, I mean, with your car standing still?

A. Possibly a minute.

Q. And what happened to the train?

A. What happened to the train, I don't understand.

Q. Did the train go over the crossing?

A. In reference to movement it went on over the crossing.

Q. Passed over the crossing?

A. Yes.

Q. What, if anything, did you see this automobile do, about which you testified as having been down at Arlington Street?

A. What did I see him do?

[fol. 111] Q. Yes.

A. I saw him leave the line of traffic, in reference to the cars directly in front of me, he left the line of traffic, and took off like he was in a hurry to go somewhere, took off fast, pulled out of the traffic and went to make a left hand turn on Tallmadge Avenue, headed west.

Q. When he took off, as you have described, tell the jury whether you heard any sound?

A. To the best of my memory I think he spun his rear wheels in releasing, even disengaging his clutch completely, because the tires spun.

Q. How did you determine that?

A. Well the sound is the only way I could determine that.

Q. What kind of a sound did you hear?

A. A screeching sound, the sound we have all heard in cars taking off quickly and spinning the wheels.

Q. Did you see the watchman actually struck?

A. The car came in the line of vision between me and the watchman and as the car left that vision the watchman was laying down. The only thing I saw was the watchman from about here and I saw him drop, I could see he had been clipped by the right rear end of the car and knocked to the ground. In fact, I made the remark to my wife at that moment—

Mr. McGowan: Object.

The Court: You say the right rear of the car?

A. To the best of my memory.

Q. That's what it appeared like to you?

A. That's correct.

Q. In other words, the car was between you and the [fol. 112] watchman?

A. At one instance it was between me and the watchman.

Q. Did you see whether the watchman moved in this striking process, if he moved in what direction?

A. I can't say I saw him move, the only thing I can remember about his actions, he was standing there swinging a lantern of some sort and when the car passed beyond the line of vision, that is opposed to my seeing the watchman, when the car passed beyond that, the watchman was laying on the ground.

Q. Did you see him—where was he lying when you saw him?

A. By the time I got there he was laying in the street.

Q. Where with reference to the railroad track?

A. You mean distance from the tracks?

Q. No, I don't say from, or on, or where. You tell us.

A. He was laying in the street a few feet west of the railroad track. Does that answer your question?

Q. That's all I'm asking you, to give us your recollection. How long did you remain at the crossing?

A. A few seconds.

Q. And by the way, did you see any other automobiles there other than this line of traffic on Home Avenue?

A. I saw the cars that were stopped heading east and as the caboose of the train passed and went on south I also saw the car that was headed west on Tallmadge.

Q. Went on south? What do you mean?

A. When the train passed the crossing and was headed in the normal direction.

[fol. 113] Q. What direction was that going, toward Akron or away from Akron?

A. I don't know, headed back toward Arlington Street, as I remember.

Q. I don't quite understand you.

A. Down this way on the map. (Indicating.)

Q. As it went over the crossing in what direction was it moving, as it went over the crossing?

A. Moving south, to the best of my recollection.

Q. Tallmadge runs east and west?

A. It was headed south, assuming Tallmadge runs east and west.

Q. The train was headed south?

A. That is to the best of my memory.

Q. Was this the same—

A. No it couldn't have been because the way I understand the incident it had to have been the same train that passed and was headed north because I got stopped at two different crossings by the same train.

Q. Let's put it this way, as you were sitting there facing the train, was the movement toward your right or toward your left?

Mr. McGowan: Movement of what?

Mr. Rootzel: Of the train.

A. I would say to my left.

Q. That answers my question. You say you remained there a short time. Did you see anybody go up to this watchman that had fallen on the pavement?

A. I saw two or three men go up to him.

Q. What did you do then?

[fol. 114] A. I saw that the situation was pretty well in hand and I took chase to this fellow, to try to get his license number.

Q. Did you succeed in getting it?

A. No, he was too fast for me.

Mr. Rootzel: I think you may cross examine.

Cross examination.

By Mr. McGowan:

Q. You are with the Weather Seal as a sales manager?

A. That's right.

Q. Mr. Feathers, you say you first saw the Ball car down at the Arlington Street crossing, is that right?

A. Yes.

Q. And you testified that what first attracted your attention to this car was he pulled up alongside of you and almost cut into you?

A. He did cut into me.

Q. And did he pull up around the left of you or the right?

A. He pulled on to my left and forced me off the road.

Q. When he cut into you you saw him, is that right?

A. Oh yes.

Q. And then when you saw him you turned your car to the right?

A. To avoid collision, correct.

Q. You'd have been in the position where if you couldn't have seen him he would have hit your car, wouldn't he, if you hadn't turned to your right?

A. I would say that's definitely correct.

Q. He would have hit your car?

A. Definitely, correct.

Q. That's why you turned, because you could see him [fol. 115] pulling in, is that right?

A. I saw the lights and I heard the screeching of tires as he braked to a stop. He was very definitely approaching the crossing at a much higher rate of speed than I was.

Q. You avoided a collision by turning?

A. That's correct.

Q. Then after the train passed you followed him up to this other crossing?

A. That's correct.

Q. And I think you testified he was a car or two ahead of you when you arrived at the Home Avenue crossing?

A. That's correct.

Q. And the flasher lights were on on Home Avenue?

A. I think that's correct.

Q. And the train was going north, a freight train?

A. I can't answer that.

Q. It was making some noise, wasn't it?

A. All trains make noise.

Q. Sure. You definitely saw the Ball car come to a stop, you said behind another car in the line of traffic?

A. That's correct.

Q. Then while you were there the Ball car pulled out of the line that was waiting to cross the railroad track?

A. That's correct.

Q. And he made a left hand turn on that thoroughfare that extends between Home Avenue and Tallmadge Avenue, didn't he?

A. I am sorry, but I don't understand.

Q. He made a left hand turn west of the westerly—he made a left turn on the pavement which is located west of [fol. 116] the westbound track of the Baltimore and Ohio Railroad?

A. Yes.

Q. And did you see the watchman before he made that turn?

A. Yes.

Q. And where was the watchman when you saw him?

A. He was in the street.

Q. And what part of the street was he in?

A. I would say about the center of the street.

Q. And I think you testified he was waving some lanterns?

A. Yes.

Q. Had a lantern in each hand?

A. One or two, I can't answer, I saw him waving a light.

Q. Then when this Ball car made this left hand turn into Tallmadge Avenue from Home Avenue you kept following, you kept following the car, did you, the Ball car?

A. In my line of vision?

Q. Yes.

A. Yes I did.

Q. You testified for an instant, while the Ball car was between you and the watchman, you lost your vision of the watchman?

A. Partial vision.

Q. You had some partial vision of the watchman at all times?

A. I think I can say yes on that.

Q. If you watched him at all times, you didn't see the watchman move, walk any place at all, he was standing still, wasn't he?

A. I can't answer that one way or the other.

Q. If you can't—my question was, you didn't see that watchman walk any place, did you, that was my question?

A. To the best of my memory, the watchman took a couple or three steps south on Tallmadge Avenue while I [fol. 117] was waiting at the crossing.

Q. Just a moment ago you said you couldn't answer the

question. Now you said he took two or three steps. When Mr. Roetzel interrogated you you didn't say that. Why do you say now he took two or three steps?

Mr. Roetzel: Object to the question.

The Court: Cross examination.

Mr. Roetzel: He wasn't asked by me whether he took any steps.

Mr. McGowan: Withdraw the question.

Q. When I asked the question before you said you couldn't say whether he took any steps or not.

Mr. Roetzel: Object. Let's have the answer read.

Mr. McGowan: Read the question.

(Thereupon the Court Reporter read the question.)

Q. Just previous to this question, you stated, previous to the last question you stated you couldn't answer that question one way or the other as to whether he took any steps?

A. The answer I'm giving you, he took a couple of steps was prior to the time the Ball car took off.

Q. He was standing in the center of the street when Ball hit him?

A. Approximately in the center.

Q. Where was he before he got in the center of the street, where did you see him walk from to get to the center of the street when Ball hit him?

A. He's still by, only taking two or three steps approximately in the center of the street.

Q. Which way did he walk, Mr. Feathers?

[fol. 118] A. He walked south.

Q. Was he walking alongside of the track?

A. Yes.

Q. Well you mean when you first saw him he was north of the center of the street?

A. It's very difficult to answer those questions because of the lapse of time between then and now.

Q. Well, as a matter of fact, if the Ball car passed in between you and the watchman there had to be an interval when you had no vision of the watchman there?

A. Not in my opinion.

Q. If the rear of the car hit Mr. Inman, the watchman, and you said the rear of the car hit Mr. Inman, didn't you, the right rear?

A. I said that, that's correct.

Q. Wasn't there a period there, an interval that car had to blind you from that watchman, between the time the front part of the car passed Mr. Inman, until the rear part of the car struck him?

A. In answering that, to the best of my ability I would think since the average man is taller than the car, at least I was sitting on the hill and had a good perspective, if you recall there's a grade there.

Q. Well I know, but even if you were on a hill and the Ball car, the rear of the Ball car, right rear fender of the Ball car struck Mr. Inman, the front of his car had to go north, north of Mr. Inman before the right rear of the car struck Mr. Inman, didn't it?

A. The car had to be north of Mr. Inman?

Q. Had to be past him, either north or northwest?

A. Yes.

[fol. 119] Q. And during the time the front of the car, or from the time the front of the car passed Mr. Inman, up until the point where he was hit, you couldn't see Mr. Inman, could you?

A. Well I can't truthfully answer, definitely, I can't stake my life either way.

Q. This happened quickly, didn't it, pretty quick?

A. Sure.

Q. You weren't expecting it to happen, were you?

A. No I wouldn't say that, if I had anticipated it would happen I would have acted accordingly.

Q. Your attention was directed to flasher lights on Home Avenue, you had intended to go across Home Avenue when that train—

A. Had I intended to proceed after the train passed?

Q. Yes.

A. I had another thought in mind.

Q. What was your other thought?

A. I felt it was my duty just as an average American Joe to get out of my car and go up and see this fellow and see if there wasn't something I could do.

Q. Before this thing happened?

A. Yes.

Q. Your attention was focused on getting across that crossing, before the train had passed?

A. Not primarily, initially, yes. That light flashing, doesn't take up my entire thinking.

Q. You were watching the train, weren't you?

A. I don't think I was paying any attention to it.

Q. Were you watching the flasher lights?

A. I was giving neither a predominate thought.

[fol. 120] Q. Well was your attention directed over to the watchman, before this happened?

A. No.

Q. You had no reason to have your attention directed over to the watchman before this occurred, the watchman who was standing on Tallmadge Avenue?

A. Nothing was out of the way that would cause my attention to be focused there.

Q. So when this man ahead of you pulled out you saw him pull out and you kept watching his car, didn't you, while he was turning there to the left from Home Avenue, didn't you?

A. I watched his car, I looked at his car and, as I say, I didn't focus my attention on anyone in particular.

Q. You didn't focus your attention then on the watchman, did you?

A. Not all—could I answer that further?

Q. Sure.

A. I didn't focus my attention on the watchman and ignore anything else.

Q. You were watching the car because you had known this man was intoxicated, so you were watching to see where he was going?

A. I watched the car and made mention to my wife "there's going"—

The Court: Wait.

Q. And then all of a sudden you saw this car make a turn and you saw the rear part of it strike the watchman?

A. I didn't see the right rear of the car hit the watchman, I assumed that was the part that hit him.

Q. So you don't know which way the watchman was facing when he was hit if you didn't see him get hit?

A. I think at the moment—

Q. No, not what you "think." Do you know?

[fol. 121] Mr. Roetzel: Object.

The Court: Does he know.

A. I don't know.

Q. You do know after you got out of your car—did you go back to the scene after this occurred?

A. After I took chase to the automobile that hit him, did I return to the scene?

Q. Yes.

A. Surely.

Q. You saw the watchman in the middle of Tallmadge Avenue between the westerly railroad tracks, didn't you?

A. I don't remember where he was when I came back to the scene.

Q. Well had they moved him?

A. I don't remember.

Q. If he was on the railroad tracks when you came back, you don't think they moved him from the westerly tracks in between the railroad tracks?

A. I didn't say he was on the railroad tracks.

Q. I'll hand you what has been marked for purposes of identification as Plaintiff's Exhibit 15 and ask you to look at it. (Handing Exhibit to witness.) Were you there when the ambulance was there, Mr. Feathers?

A. Yes sir.

Q. And you saw the watchman lying in the center of Tallmadge Avenue, didn't you? I'll ask you now to refresh your recollection if he wasn't lying in between the west tracks, the most westerly tracks of the B & O? (Handing Exhibit to witness.)

A. It looks obvious in the picture.

Q. I'll show you another Exhibit, 16, and ask you to look at that and see whether or not that refreshes your recollection as to where he was lying when you got there?

[fol. 122] (Handing exhibit to witness.)

A. It would have to refresh my recollection.

Q. Was he in the middle of the tracks?

A. Yes.

Q. And you know he was on Tallmadge Avenue?

A. (No answer.)

Mr. McGowan: That's all.

(Witness excused.)

Thereupon in order to further maintain the issues on its part, the Defendant called as its next witness JOHN M. MARTIN who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Roetzel:

Q. You may state your name, please?

A. John Mack Martin.

Q. Mr. Martin, I don't know if you have ever been a witness. Have you ever been a witness in a court room?

A. No sir.

Q. I'm going to ask you some questions and please listen as carefully as you can and answer them as directly and definitely as you can, and in answering will you talk loudly enough so the last lady in the jury box can hear you. Talk to the jury.

A. Yes sir.

Q. How old are you?

A. 44.

Q. And where do you live?

A. 896 Anapolis Avenue, Akron, 10, Ohio.

Q. Are you single or married?

A. Married.

Q. And by whom are you employed?

A. City Baking Company.

[fol. 123] Q. What Baking Company?

A. City.

Q. How long have you been employed by the City Baking Company?

A. Since May, 1930.

Q. And continuously?

A. Yes sir, except when I was in the army.

Q. When were you in the army?

A. January 1942 till February 1945.

Q. What kind of work do you do for the City Bakery?

A. I'm a boilerman, fireman.

Q. Have you done that kind of work all the time?

A. Yes sir.

Q. Now on the 2nd day of January, 1952, were you at the Home Avenue, Tallmadge Avenue Railroad crossing in the early morning?

A. Yes sir, I was.

Q. Were you walking or driving?

A. I was driving.

Q. And on what street did you approach that crossing?

A. On Home Avenue going north.

Q. Was anyone else in the automobile with you?

A. No sir.

Q. And did you stop at that crossing?

A. Yes sir.

Q. Were there any automobiles ahead of you when you stopped?

A. Yes sir, there was.

Q. About how many?

A. The best I can remember there was four.

Q. And are you familiar with that crossing?

A. Yes sir.

Q. Where is your home with reference to that crossing?

A. North of the crossing, toward the Falls.

[Vol. 124] Q. And in going from your work to your home would you go by that route?

A. Yes sir.

Q. Directing your attention to the photograph which has been marked as Plaintiff's Exhibit 12, I'll ask you to look at it and see whether you recognize the street or streets which are shown on that photograph? (Handing Exhibit to witness.)

A. Yes sir, I do.

Q. What street is the one which is shown in the middle of the photograph? (Indicating.)

A. That's Home Avenue.

Q. What direction are you looking?

A. Looking north.

Q. And you notice at the bottom of the photograph there are two rails— (Indicating.)

A. Yes sir.

Q. —of a railroad track? What is the grade from that railroad track down to the Tallmadge Avenue crossing?

A. Well it isn't steep, probably three to five degrees, maybe.

Q. In other words, it's a downgrade?

A. That's right, your car will roll if you don't hold it with the brakes.

Q. I want to direct your attention on this photograph to a standard which has a railroad crossing sign, do you see it? (Indicating.)

A. Yes sir.

Q. And below it two circular disks which look rather dark here. What are those? (Indicating.)

A. Those are the railroad signal lights.

Q. Commonly called flasher lights?

A. Yes sir.

Q. Then you see also at that point another round circular disk. What is that? (Indicating.)

A. Boulevard stop sign.

[fol. 125] Q. And is Tallmadge Avenue a main thoroughfare at that point?

A. Yes sir.

Q. In other words, Home Avenue traffic has to stop before going on Tallmadge?

A. Yes sir.

Q. Now where with reference to that stop sign and that flasher light do you think the first automobile in line was stopped as you came up there?

A. Well he must have been the front of his car was just about even with the stop sign, this side of the first track. (Indicating.)

Q. Pardon me. Had you finished?

A. Yes sir.

Q. Do you know where your car stopped with reference to this track shown on Exhibit 12? (Indicating.)

A. I would be half-way down the hill, possibly three car lengths up from this top track. (Indicating.)

Q. Were those flasher lights working when you arrived?

A. Yes sir.

Q. In other words, blinking on and off red?

A. Yes sir.

Q. Was there any train on the crossing when you arrived?

A. A slow freight train.

Q. What direction was it moving?

A. North, or northwest, going toward Cuyahoga Falls.

Q. About how long did you remain there?

A. Well possibly ten minutes, five to ten minutes. I don't know definitely, five to ten minutes.

Q. And were a number of cars in that train?

A. Yes sir, it was a long train.

[fol. 126] Q. And you said it was a slow freight? By that you mean the freight wasn't moving fast?

A. That's right, sir.

Q. Now while you were there did that freight remain on the crossing all the time you were there?

A. Yes sir.

Q. And how long did that continue?

A. Well till the train cleared the crossing, you mean?

Q. Yes.

A. Five to ten minutes.

Q. And did the train clear the crossing before you started—

A. Yes sir, it had just cleared.

Q. Now did you see an automobile do anything with reference to that line of traffic headed north, any one of those automobiles?

A. As the train cleared the crossing the traffic started to move up to the Tallmadge Avenue intersection and it was the second car in front of me pulled out of line and speeded up alongside these first two cars, I think two cars in front.

Q. You say he speeded up. Tell the jury if you heard any sound?

A. I heard his tires squeal.

Q. And where did that car move with reference to the middle line of Home Avenue?

A. Well he would have had to come out over the center of the street, I don't know how far he went over, then he did go straight with the traffic that was moving north for a little distance.

Q. Then what did you see happen?

A. He went up to the tracks, about to the tracks, he may have got on the first track, up close, he made a quick left turn.

Q. Now did you see anyone, that is any pedestrian at that crossing?

A. All I saw was the watchman.

[fol. 127] Q. That's what I'm trying to bring out. Where did you see the watchman?

A. On the west side of the track in the middle of Tallmadge Avenue, possibly four to eight feet to the west of the tracks.

Q. And when did you see him with reference to the time that this train passed over the crossing, when did you first see him?

A. As I came up to my position I could see him standing in his position in the center of the street as I stopped.

Q. While you were standing there still?

A. Yes.

Q. And you said you were there five minutes?

A. Five to ten minutes.

Q. And from the position you were you saw this watchman standing—

A. Yes I could see him.

Q. —in the position you told the jury?

A. Yes.

Q. Did he have anything in his possession?

A. His lantern, his stop lantern, he had two lanterns there.

Q. You remember the colors?

A. A red and green one.

Q. Now did you see that watchman at any time after that?

A. As the train cleared and the traffic started to move up I remember seeing him take one or two steps forward.

Q. What direction?

A. East, or a little toward his station house which would be on the right side of Tallmadge Avenue going east.

Q. You mean by the station house, you mean the watchman's shanty?

A. Yes.

Q. I point on this same Exhibit Number 12, there's a [fol. 128] cross mark made, is that the shanty you're talking about? (Indicating on Exhibit.)

A. Yes sir.

Q. And that shanty is what direction from where the center line of Tallmadge Avenue is, west of the crossing?

A. I'd say just a little southeast.

Q. And you saw him take a couple of steps in this direction? (Indicating.)

A. Yes sir.

Q. Now where was this automobile, where was this automobile at that time?

A. Well at that time the traffic started to move up and this automobile pulled out and since he pulled out of line I watched him.

Q. You watched the automobile?

A. Yes sir.

Q. And did you see the watchman again before the automobile made its left turn?

A. No sir I didn't, the automobile went between he and I and I didn't see him at that time.

Q. You didn't see him actually struck?

A. No sir.

Q. This automobile you said pulled out and then seemed to go north and then made a sudden or sharp turn, is that what you said?

A. That's right, sir.

Q. Was there any change in its speed?

A. Well as he started to make his left turn he came to a quick stop, maybe not a dead stop, but a temporary stop, then he took off again.

Q. Did you hear any sound at that time?

A. I heard his tires squeal again.

Q. Did you see any automobiles on Tallmadge Avenue [fol. 129] headed, or west of the crossing?

A. Headed east, yes sir, there was a car in the center. In fact, I think there were two lines of cars going east; one, I'm sure.

Q. Did you notice that automobile do anything?

A. I noticed as this car made its left turn, the hit skip driver I called him, I just happened to glance and I saw the car that was going east, the headlights, he hadn't moved much, he had moved a little, I saw his front end go down from putting on his brakes.

Q. Indicating he was putting on the brakes?

A. Yes.

Q. When was that with reference to the time this hit skip automobile made that quick left turn?

A. Just as he was making his left turn.

Q. Now did you see any automobiles on Tallmadge Avenue headed west?

A. Yes sir.

Q. Did you see any of them do anything before the time—

Mr. Roetzel: Strike that.

Q. Did you see them do anything?

A. As the train cleared the crossing, as the traffic started to move up, that is the Home Avenue traffic is the line I was in, the traffic going west on Tallmadge Avenue had also moved up, and was getting pretty close to the railroad tracks.

Q. And you saw that after the caboose cleared the crossing?

A. Yes sir, or as it was clearing.

Q. When, with reference to the time you saw that, was it that this automobile pulled out and went up Home Avenue [fol. 130] and then made the left turn. As the automobile pulled out and was going to the Tallmadge and Home Avenue intersection the Tallmadge Avenue traffic traveling west was moving up at the same time. In other words, they would have come together that way if they would have continued.

Q. Did you go—did you stop—did you go up to the scene?

Q. And did you see the watchman there?

A. Yes sir.

Q. Mr. Inman?

A. Yes sir.

Q. And where was he when you saw him?

A. Laying between the, he was almost in the center of the street, possibly a little to the right center, traveling east, in between the track on the west side.

Q. The westbound track, the most westerly track, in between the rails?

A. That's right.

Q. And did you remain there for a time?

A. I stayed until we lifted him in the ambulance.

Q. And do you remember about how long it was from the time this occurred until the ambulance arrived?

A. The ambulance came pretty quick, I would say not more than fifteen minutes.

Q. Did Mr. Inman remain in this same position, in between the rails all that time?

A. Yes, someone wanted to move him, I was sure his leg was broken and I suggested that we let him stay still and not move him unless we have to.

Mr. Roetzel: I think you may cross examine.

[fol. 131]

Cross examination.

By Mr. McGowan:

Q. You live out in that vicinity?

A. Yes.

Q. You travel over that crossing frequently?

A. Yes sir.

Q. You did before this occurrence?

A. Yes.

Q. Both in the daytime and night time?

A. Yes sir.

Q. There's a lot of vehicular and truck traffic on Home Avenue crossing, is there not, in both directions?

A. Yes sir.

Q. And a lot of vehicular and truck traffic passing that railroad crossing on Tallmadge going in both directions?

A. Yes sir.

Q. That is true not only in the daytime but night time?

A. Heavily traveled.

Q. Would you call it heavily traveled?

A. Tallmadge is.

Q. And Home is?

A. Yes.

Q. In addition there is actually another crossing just a few feet west of that, the Pennsylvania crossing?

A. Yes.

Q. And they cross both Tallmadge and Home?

A. Yes.

Q. So as you approach this crossing you meet the Pennsylvania tracks, isn't that right?

A. Yes sir.

Q. Then assuming as you meet the Pennsylvania tracks on Home Avenue and then a few feet east of that you'd come up to the B & O track?

A. On Home Avenue?

Q. Yes.

A. On Home Avenue if you were traveling north you would approach the Pennsylvania track first.

[fol. 132] Q. Yes, if you were traveling north, I said east—I'm sorry—you'd approach the Pennsylvania track, and are there a set of flasher lights at each side of the Pennsylvania tracks?

A. Yes sir, there is.

Q. Sometimes when you're going over this crossing there will be trains on both crossings, won't there?

Mr. Roetzel: I object to "sometimes."

The Court: Yes, sustained.

Q. Now when you first pulled up there you came to a stop because there was a train at the crossing and the flasher lights were flashing?

A. Yes sir.

Q. When you looked over and saw Mr. Inman you said he was in his position, he was where he was supposed to be, where you had seen him on other occasions?

A. Yes sir.

Q. About in the center of Tallmadge Avenue I think you said, about four—

A. Four to eight feet west of the track, that's right.

Q. And he had a lantern in each hand?

A. Yes he did.

Q. And he was facing east, wasn't he?

A. Yes he was.

Q. Then you saw this car pull out and hit him, didn't you?

A. I saw the car pull out, I saw it come up to the intersection, saw it make its left turn.

Q. He made a stop before he went into that intersection?

A. No, as he was making the left turn into Tallmadge.

Q. What do you mean?

[fol. 133] A. I heard something and I heard someone holler and at that instant he stopped but he was making a left turn on Tallmadge.

Q. You saw the car hit Mr. Inman—you didn't see that?

A. I didn't see the car strike him, the car was between he and I.

Q. The next thing you saw Mr. Inman lying in between the two rails of the westerly track?

A. That's right.

Q. You got out of your car and tried to render help and assistance?

A. I pulled over, there was no traffic going south, I pulled over back of that little welding shop, and pulled up.

Q. He was right in the middle of Tallmadge Avenue?

A. Almost in the middle, a little to the south side, if I remember right.

Mr. McGowan: I think that's all.

Mr. Roetzel: That's all. Thank you very much.

(Witness excused.)

Thereupon in order to further maintain the issues on its part the Defendant called as its next witness **RAYMOND B. PETERSON** who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Roetzel:

Q. You may state your full name, please?

A. Raymond B. Peterson.

Q. Now talk loudly and when you answer any question I ask you or any one Mr. McGowan asks you will you please face the jury and talk loudly so that the last lady in the [fol. 134] jury box can hear you. Now then I ask you a question, Mr. Peterson, will you please pay as close attention to it as you can and answer as directly as you can.

A. Yes.

Q. Where do you live, Mr. Peterson?

A. 307 Grandview Avenue, Newcastle, Pennsylvania.

Q. By whom are you employed?

A. Baltimore & Ohio Railroad.

Q. What is your age?

A. 52 next October.

Q. Are you single or married?

A. Married.

Q. How long have you been employed by the Baltimore & Ohio?

A. In the capacity of brakeman and conductor since 1924 in November.

Q. You have worked for that same employer ever since?

A. That's right.

Q. Now on the 2nd day of January, 1952, and on the 1st of January, 1952, what kind of work were you doing?

A. I was a flagman on an extra east out of Willard.

Q. What do you mean by an "extra east"?

A. It's a train that's not scheduled in the time table, freight train.

Q. Now when you speak of east, what do you mean by that?

A. Our railroad direction, on the Akron Division our main line is an east and west railroad.

Q. Where did that train start, or originate?

A. Originated at Willard, at Willard, Ohio.

Q. Where is Willard with relation to Akron, what direction?

A. I would guess it's north and west, approximately seventy-five miles.

[fol. 135] Q. Now you say you were a flagman on that train?

A. Yes sir.

Q. And does the Company in the regular course of its business keep a record of the makeup of these trains, all of the

A. Yes.

Q. And does that have a name?

A. Wheel report.

Q. And was there a wheel report made of this particular train?

A. Yes sir.

Q. Do you have that in your possession?

A. I do.

Q. Will you produce it, please?

A. (Witness gives Mr. Roetzel paper.)

Mr. Roetzel: Mark these Defendant's Exhibits D-1, D-2, and D-3.

(Defendant's Exhibits D-1, D-2, D-3 were marked.)

Q. Directing your attention to D-1, D-2, and D-3, I'll ask you if that's the wheel report you just took from your pocket and gave to me? (Handing Exhibit to witness.)

A. Yes.

Q. Is there anything on that wheel report which is in your handwriting?

A. Yes sir.

Q. You may tell the jury whether or not this is the wheel report of the extra train about which you have already testified? (Indicating.)

A. It is.

Q. Moving east from Willard?

A. Yes.

Q. Does that record show the time at which that train left Willard, Ohio?

A. It does.

Q. What time?

A. 5:50 P. M.

[fol. 136] Q. I notice there's a 4:30 P. M. which is typed in and then the 5:50 is in longhand. How do you explain that?

A. This train was originally called for 4:30 P. M. The call was changed to 4:35; the call was changed to 4:35. The call time is put on there when the clerks make up these wheel sheets. When we leave the terminal, the time the train clears the terminal we mark in there the clearing time of the train which was 5:50 P. M.

Q. How many cars were in that train?

A. Fourteen loads and eighty empties.

Q. Does that include the locomotive and the caboose or are those extra?

A. Extra.

Q. Do you know what kind of a locomotive was on this train, steam or Diesel?

A. Report shows 4414, steam engine.

Q. Directing your attention to the first page, Defendant's Exhibit D-1, I notice some printed language in the left hand column, it says "number of cars," and then there are the numerals, "1, to 21" which are printed on that page, is that correct?

A. That's correct.

Q. And then in the next column—that is the left column on the page as you look at it—the next column to the right is "1 initial." Then under that is "caboose," and then blank spaces in which have been written certain letters. What do those letters indicate?

A. The letters designate the railroad which had the car built, or owns the car.

Q. And then the next one is "loaded car number," and then there's a series of numbers down there, is that correct? [fol. 137] A. That's correct.

Q. And then in the next column, which is numbered "3, Empty car number of contents of loaded car," and then under that there are written in the first space "C-r-e-w," what is that?

A. That's crew.

Q. Then the next word down in that column is "coal." And that same word appears after numbers 1, 2, 3, 4, 5, right on through?

A. For fourteen cars.

Q. Does that mean those were loaded with coal?

A. Yes sir.

Q. Then the next column, number "4, kind," then the letter "H" appears. What does that mean?

A. Hopper.

Q. Is that the same thing as a box car?

A. No sir.

Q. What is a hopper car?

A. A hopper car is a car that's open-topped equipment, fairly high, with pockets dropping from the bottom from which the coal or other contents may be unloaded without too much trouble.

Q. Now in the next column it says "where taken." And under that appears the number for each car, Number "715." What does that mean?

A. 715 is our designation for Willard, Ohio, each station has a number or initial, and 715 is Willard, Ohio.

Q. Does that mean it's the place which you got the car?

A. Yes.

Q. Next "where left," and under that "667", as to each car except the caboose which carries the number "568." What does the number "667" mean?

A. Designates the station number of Sterling, Ohio.

[fol. 138] Q. Were these cars shown on the first page, Hopper car, all left at Sterling, Ohio?

A. Yes sir.

Q. Is Sterling between Willard and Akron?

A. Yes sir.

Q. Is it then correct to state all of these cars, except the caboose, shown on the first page, were no longer in the train at the time it arrived in Akron?

A. Yes sir.

Q. I notice in column 8 it says "Balance of train consists of 80 empty gons for Baltimore, Maryland, wheeled by hand." What does that mean?

A. It means the rest of the train were empty cars, were gondolas billed for Baltimore, Maryland.

Q. Is that the same type of car you talked about?

A. No sir.

Q. A gondola is different than a hopper?

A. That's right.

Q. Tell us what the difference is?

A. A gondola is open-top equipment which is not nearly so high, in this particular case the train is going to Baltimore, undoubtedly with other shipments, and those as a general rule run anywhere from approximately seven foot to eight feet high from the top of the rail.

Q. Turning to the second page, there are similar columns there, are there not? (Indicating.)

A. Yes sir.

Q. But this—whatever is put here is put in in longhand, is it not?

A. Yes sir.

Q. Now I want to go back to the first page where it says "wheeled by hand."

A. This particular sheet was wheeled on a typewriter, [fol. 139] number 1.

Q. That is the first?

A. The balance of the sheets were written in longhand.

Q. And you in railroad parlance refer to that as wheeled?

A. Yes sir.

Q. So the rest of the Defendant's Exhibit D-2 and 3 are all in longhand?

A. Yes sir.

Q. Now referring to all the cars which are noted on page 2, D-2, the letter "G" appears throughout. What does that mean?

A. Short for gondola.

Q. On page 3 the letter "G" appears through. What does that mean?

A. Also means gondola.

Q. Now what is the destination of all of those cars shown on D-2 and 3?

A. Column 8 shows final destination Baltimore, Maryland.

Q. Were all of those cars shown on pages D-2 and 3 in the train at the time it went through Akron?

A. Yes.

Q. On the back of that train was there a caboose when it went through Akron?

A. Yes sir.

Q. Was it still being pulled by the same locomotive?

A. Yes sir, if a locomotive had been changed it would have been noted.

Q. Now were you on that train when it went through Akron?

A. Yes sir.

Q. And where were you on the train?

A. Standing on the rear platform of the caboose.

Q. Were you on that platform at the time this train passed over the Tallmadge Avenue crossing in Akron?

[fol. 140] A. Yes sir.

Q. How frequently have you gone over that crossing before the 2nd of January, 1952?

A. Numerous times; too numerous to mention. I've been employed for twenty five years, or better, on the road.

Q. Was that part of your regular run?

A. Yes sir.

Q. So you're familiar with the crossing?

A. Definitely.

Q. Now as you passed over that crossing, either before you passed over or after you passed over, tell the jury whether you saw anything happen? Answer that yes or no.

A. Yes.

Q. Tell the jury what you saw happen while you were passing?

A. I saw the crossing watchman being struck by an automobile which came down from Home Avenue and turned left going west on Tallmadge Avenue, this happened just about the time the caboose just cleared the crossing.

Q. Now as you came on to that crossing did you see the watchman, as you came on to the crossing?

A. Yes sir.

Q. What direction were you facing then?

A. Geographically, west.

Q. In other words, what direction does Tallmadge Avenue run geographically?

A. East and west.

Q. Then you were facing the right from the caboose?

A. That's right, I had my right side towards the back of the caboose.

Q. Was there any reason for your facing that way, if so state why?

A. It's customary when passing some place where an [fol. 141] employee may be stationed to observe that employee so as to see if he gives a signal that would affect your movements of your train, such as a hot box, and so forth.

Q. Did you look for the watchman then?

A. I did.

Q. Did he give you any signal to indicate there was anything wrong with the train?

A. No signal to indicate there was anything wrong with the train.

Q. What did you do then, if anything?

A. Turned, with my back towards the back of the caboose which would be facing more in a southerly direction.

Q. And how soon after you turned your back to the back of the caboose and faced in a southern direction, did you see this automobile coming north on Home Avenue?

A. Well it was almost right away because when I first saw the crossing watchman, the caboose was on the crossing; we were moving at approximately six miles an hour, and the distance from the center of the crossing to the edge of the crossing is so, is not very far, so it was almost, almost right away, you might say.

Q. Where was the caboose with reference to the crossing at the time you saw this automobile first?

A. I didn't see the automobile until it was right on the spot, almost on the spot, where it struck the crossing watchman.

Q. All right. From the time that you say that you looked and saw the watchman and got no signal from him, did you continue to watch him?

A. Well through the side, side vision, I saw the automobile; and I turned because it looked to me like it was close and as soon as—I no more than turned my head until the automobile struck him.

[fol. 142] Q. Did you notice in what direction Mr. Inman was facing at the time he was struck?

A. He was turned towards, what would be the south curb on Tallmadge Avenue.

Q. How far from the south curb was he at the time he was struck, that is if the curb were extended across Home Avenue?

A. Approximately ten feet.

Q. And what happened when he was struck?

A. He was thrown slightly forward, when I say forward, the direction the automobile was going at that time, and off to the side, towards the right of the automobile.

Q. And where did he come to rest?

A. Right on the westbound main track, railroad direction.

Q. Now what, if anything, did you do with reference to that?

A. When I saw this motorist getting out of the car to come to his assistance I figured the best thing for me to do would be to throw fuses off on the westbound main track because there was a passenger train due, and write a message out to drop off at XX tower, so crossing protection could be afforded for the balance of the night.

Q. Did you drop off a message?

A. I did.

Q. And where did you drop off a message?

A. XX tower.

Q. How far is XX Tower from this point?

A. Roughly two mile.

Q. And was your train still moving at about the same speed?

A. We were picking up speed then.

Q. By the way, I didn't ask you, did you notice whether Mr. Inman had anything in his hands?

A. He did.

[fol. 143] Q. What was it?

A. Red and white lantern.

Q. Red and white?

A. Beg your pardon, red and green.

Q. Do you remember now which hand he had which?

A. No sir.

Q. You don't remember that. Did you see anything happen to those lanterns at the time he was hit?

A. I saw the lanterns fly towards the ground after he was hit.

Q. At the distance you were did you have any difficulty in distinguishing Mr. Inman at the crossing?

A. No sir.

Q. And were the lights of these lanterns plainly visible?

A. Yes sir.

Q. Did you yourself notice any other traffic moving at that time except this automobile which struck him?

A. I can't say that I did.

Q. Did you observe what part of the automobile struck him?

A. I do know the right front fender hit him.

Q. Do you know whether the bumper hit him, or not?

A. I couldn't say.

Q. And how was Mr. Inman facing with reference to the automobile at the time of the collision?

A. Possibly a little diagonally to the direction of the automobile. In other words, more than likely it was looking across, he was going towards the curb.

Q. Which curb?

A. South curb of Tallmadge Avenue.

Q. Yes.

[fol. 144] Mr. Roetzel: All right. That's good enough.
Cross examination.

Cross examination.

By Mr. McGowan:

Q. What part of his body did the automobile hit?

A. I can't say. He was between the car and I.

Q. When he was hit he was about in the center of the street, wasn't he?

A. I would say he was closer to the south curb of Tallmadge Avenue.

Q. How close to the south curb of Tallmadge Avenue would you say he was when he was hit?

A. I'd say eight foot.

Q. How wide was that street at that point over that crossing at that time?

A. I'm sorry, I can't answer that. I don't know exactly how wide it is.

Q. Well how far was he from the center of the street?

A. Due to the fact it's an intersection there and the curb-line is not extended so that I can tell—I don't believe I could answer that.

Q. Well if he was struck eight feet from the south curb-line, you said eight feet from the south curbline, how far was he from the center, taking your own idea of the curb-line?

A. Oh ten, twelve feet, mebbe.

Q. Ten or twelve feet from the center?

A. That's a guess. I don't know.

Q. And you saw him fall, did you?

A. Yes sir.

Q. In between the tracks?

A. On to the westbound main track.

Q. And then you went on up and flagged the train that was coming from the west, going east?

A. No sir.

[fol. 145] Q. You were going to put a fusee out?

A. I did.

Q. You put a fusee out. That was to stop the train out there?

A. Yes sir.

Q. You say it was the watchman's duty to keep watching your train as it went by to see if there were any hot boxes or anything wrong with your train and if there was he'd give you a signal? That is customary?

A. That's customary, other duties permitting he is generally required to do that.

Q. I assume he has done it before in the past, he had been there a number of years, hadn't he?

A. Yes sir.

Q. He had watched trains you had been on?

A. Yes sir.

Q. And if he saw something wrong he'd give you a signal?

A. That's right.

Q. Of course when a train was going east across the crossing he'd be on the west side of the track, wouldn't he?

A. Yes sir.

Q. That was where he was supposed to be for a train going east?

A. Yes sir.

Q. And so in order to see if there was anything wrong with your train, any hot boxes or anything else wrong with it he'd have to be looking in an easterly direction, wouldn't he?

A. Yes.

Q. If your train was east of where he was standing?

A. Well that may not be entirely necessary, he could look towards the south or the direction from which we were coming, and get a view of the side of the train, at a distance.

Q. But in order to see the cars, hot box, that's something [fol. 146] that takes place under the individual car, isn't it?

A. That's right.

Q. That's where the axle is?

A. Yes sir.

Q. So in order to get a good view of a hot box the best view would be when he's right alongside the car, wouldn't it?

A. No sir.

Q. That would be a vantage place, wouldn't it?

A. It would be.

Q. And in order to look this train over he'd have to be facing east, wouldn't he?

A. I said before, not necessarily.

Q. Or southeast, south and east?

A. Yes sir.

Q. Now he's supposed to do that if his duties permit. Of course he had other duties at that crossing?

A. He has traffic to keep.

Q. What about watching for other trains that come from the west going east while he's out there?

A. From the west going east.

Q. Or from the east going west?

A. From the east going west—well of course the crossing watchman could answer that better than I. However, there's a block signal, southeast of Tallmadge Avenue which lights up when there's a train on the circuit which

means after it has passed a certain point between Cuyahoga Falls and Tallmadge Avenue.

Q. Well in order to see that he'd have to look—

A. Southeast.

Q. — southeast. It would be his duty to keep watching either to the east or to the southeast as you say, either to [Vol. 147] the southeast or to the north, you could watch to the north to see if a train was coming around the corner, there's a bend right at the intersection?

A. Yes sir.

Q. The reason for that is if there's a train approaching, because of the heavy traffic on Home Avenue and Tallmadge Avenue he wouldn't dare let that traffic start over in the face of a train coming in the opposite direction?

A. No sir.

Q. Doesn't he have to stay out there to see that that traffic does not move if there's another train coming?

A. Yes sir.

Q. In order to tell—after he once leaves his shanty house that's over on the east side of the intersection—

Mr. McGowan: Withdraw that.

Q. While he's in the shanty, they have a system of lights that tells of trains approaching?

A. I believe they have.

Q. And after he's out of the shanty he doesn't have available that system of lights he has in the shanty?

A. I understand there are lights on a pole.

Q. Where?

A. At the crossing.

Q. Now or then?

A. I think there was then, I'm not positive; that's not my department.

Q. You don't know how those lights operated?

A. No sir.

Q. You don't know whether he could see the light that you say was there from the position he was in that night, when a train was passing going in an easterly direction across that crossing?

A. According to how high

[fol. 148] Q. You're not in a position to state how high they were or how the light was, how it functioned?

A. No sir.

Q. Now this train left Willard, Ohio, what time?

A. 5:50 P.M.

Q. Willard is how far from here?

A. Approximately seventy-five miles.

Q. And you arrived at that intersection what time?

A. 12:10 A.M.

Q. You had ninety-four cars on, in addition, and the engine and caboose?

A. Not when arriving here.

Q. How many cars did you have?

A. Eighty.

Q. And an engine and caboose?

A. Yes sir.

Q. You were riding in the caboose that night?

A. Yes sir.

Mr. McGowan: I think that's all.

Redirect examination.

By Mr. Roetzel:

Q. One other question. Were any of those cars loaded?

A. At Tallmadge Avenue?

Q. Yes.

A. No sir.

Q. Now had this train made any stop other than the time you cut out the cars shown on the first page, Defendant's Exhibit D-1, which you say was done at Sterling, Ohio?

A. Yes sir.

Q. Where did you stop besides that?

A. Warwick, Ohio.

Q. For what purpose?

A. Well we had to stop for fuel, coal and water, at Warwick, evidently from the time consumed between Sterling and Akron. Tallmadge Avenue, we were undoubtedly [fol. 149] still in the siding at Warwick for a couple of east-bound passenger trains.

Q. On the Baltimore & Ohio at that time what is the fact as to whether or not the passenger train had the preference and right-of-way?

A. Definitely.

Mr. Roetzél: That's all.

(Witness excused.)

ELMER FOX who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Guster:

Q. Mr. Fox, as I give you these various questions will you address your answers to the jury making certain that the last lady in the jury box hears everything that you say:

A. Yes sir.

Q. Would you state your name, please?

[fol. 150] A. Elmer F. Fox.

Q. Where do you live?

A. 130 Wadsworth Avenue, Cuyahoga Falls.

Q. Where are you employed?

A. Baltimore & Ohio Railroad at Cuyahoga Falls.

Q. What are your duties, what is your job on the railroad?

A. Signal maintainer.

Q. How long have you been so employed?

A. You mean in the Signal Department, or by the Railroad?

Q. That's right.

A. In the Signal Department since 1936, September.

Q. How long have you been employed by the railroad?

A. Since 1929.

Q. Have you been in the Signal Department that whole length of time?

A. No, since September of 1936, the Signal Department.

Q. Would you describe to the jury the duties of a signal maintainer?

A. The maintenance and repair and inspection of all automatic block systems and highway protection.

Q. In your particular job, where is the area of your particular responsibility on this job?

A. Akron Junction to the Black Horse Crossing, it's about a mile, mile and a half this side of Ravenna.

Q. Where is Akron Junction?

A. It's about a mile and a half west of Tallmadge Avenue and it's where we join with the Pennsylvania.

Q. Now are you familiar or were you familiar with the Bettes Corners crossing at Home and Tallmadge Avenues [fol. 151] on January 2nd, 1952?

A. Yes sir.

Q. Now would you describe what has been referred to in this case as a block signal, what is a block signal and what is a block system as used by the Railroad?

A. Block signal is a signal for the safe movement of trains. That is, to speed, and also in respect to the movement of the trains in that block.

Q. What is the purpose of this block system, or system of blocks on the railroad right-of-way?

A. For the safety of the movement of trains.

Q. Now how are these signals operated?

A. We have a track circuit, that is the main part of the signal, then there's the line circuit, also, in connection with the circuit.

Q. Are these activated by electricity?

A. Yes sir.

Q. Now at this particular crossing for eastbound trains, where is the westerly most point on this particular block in which the Bettes crossing is located?

A. You mean the activation of the signals?

Q. Generally, how far to the west geographically?

A. Approximately 2200 feet plus.

Q. At that point, when an eastbound train reached that point what would happen?

A. The approach signal east of Bettes Corners would light and also the crossing signals at Bettes Corners would light.

Q. You mean the flasher lights at Home and Tallmadge Avenue?

A. Yes sir.

Q. Anything else that would happen at that particular [fol. 152] time?

A. Tell-tail light at the crossing for the watchman.

Q. What is the tell-tail light?

A. It's for the watchman to know there's a train coming.

Q. Do you know where these tell-tail lights are located?

A. One on the pole right west of the crossing watchman's shanty, and one in the crossing watchman's shanty, in the window.

Q. This light on the pole, was that there in January of 1952, January 2nd, 1952?

A. January 2nd of 1952 this light was on a City telephone pole, north of the crossing watchman's shanty at that time.

Q. And approximately how high was the light located?

A. I imagine it was about twenty-feet, thirty foot pole; I think about five foot from the top of the pole.

Q. Now when the eastbound train hit this circuit, the block circuit, and started the flasher lights and these tell-tail lights, what kind of a signal would these tell-tail lights give to the crossing watchman?

A. Flashing signal.

Q. Now assuming that an eastbound train was passing over the crossing going east toward Ravenna, how long would the flasher lights remain flashing or blinking before they would stop?

A. They would remain flashing until the caboose was clear of the crossing, approximately seventy five feet from the center of the crossing, until they were clear of the crossing.

Q. Now for a westbound train, at what point would the block signals be lighted by a westbound train approaching [fol. 153] the crossing?

A. The block signal approach would be lighted approximately 3400 feet plus from the crossing.

Q. And when the train, westbound train hit that point, arrived at that point, what would happen?

A. The tell tail lights would come on at the crossing and also at the approach system west of the crossing.

Q. Would the flasher lights go on?

A. Not at that time, no.

Q. At what time would the flasher lights go on for a westbound train?

A. For a westbound that's approximately 2,000 feet plus, east of the crossing.

Q. So there would be approximately 1,000 feet between the block signal lighted, and the flasher lights being lighted?

A. Yes.

Q. Then assuming this westbound train passed over the crossing at what point would the flasher lights go out?

A. The caboose would be clear of the crossing, that is a little over a hundred feet west of the center, the crossing is diagonal.

Q. Would the block signal remain lighted at that time?

A. Yes.

Q. What time, what location would the block signal go out?

A. Not until the caboose had passed the signal.

Q. Approximately, where would the train be located?

A. Well he would be 2200 feet west, the east and westbound are approximately across from each other, the break in the track.

Q. Would you describe for the jury a standard block signal as used by the Baltimore and Ohio, on January 2nd, 1952?

[fol. 154] A. You mean as to the aspects of this?

Q. That's right.

A. They have two red lights, two yellow lights, and a white marker light, that is these approach signals, the one on the east, on the east they have two reds, two yellows and two green and a white, on the eastbound approach.

Q. I take it by your answer on your westbound train there's no green signal?

A. Right.

Q. On the block signal located south of Tallmadge Avenue?

A. Right.

Q. Or near Evans Avenue, as the testimony here has shown?

A. That's right.

Q. Why is that?

A. We're approaching another railroad at that point and they control the signal to leave your trains on to their track and they have to go through that block, prepared to stop short of the next signal, that is their aspect. That's what the aspect means, the yellow aspect.

Q. What are the positions of the yellow lights, when the yellow lights are shown?

A. Yellow, diagonal 45, up and down to the left.

Q. What is the overall height of this block signal or approach signal, as you call it?

A. You mean the whole, the mast?

Q. That's right.

A. The mast is twenty seven feet.

Q. What is the position of the disk in which these red and yellow lights are located?

A. The red lights they're closed, horizontal, approximately [fol. 155] matly twenty-seven feet above the top of the rail.

Q. Under what circumstances would a red signal show on that block?

A. A train in the block ahead.

Q. If such a signal were showing, a red signal were showing on the block, what would an engineer do when he saw that signal?

A. He has to stop at that block before he gets to the block and then proceed through the next block, that is the next signal, prepared to stop at any time in that block.

Q. That would indicate to him there was something ahead that, some reason he shouldn't proceed beyond that point?

A. That's correct.

Q. Now is there a white light also located on a block system?

A. Yes.

Q. Is that light also lighted?

A. Always lighted, with any aspect on the signal.

Q. In other words, it's only when the red and yellow lights are lighted the white lights are showing?

A. That's right. Whenever there's no train on the circuit.

Q. So then if no lights were lighted on that block signal located on Tallmadge Avenue that would indicate no trains within the block?

A. Yes.

Q. Going back to the block circuit itself, are there insulated portions of the rail which indicate the length of the circuit?

A. Yes sir, insulated joints at both ends of the circuit.

Q. What is the purpose of those insulated joints?

A. Well you have in the track circuit you have a battery [fol. 156] at the one end and a relay at the other and you use the rails as the the insulated joint insulates one from the other. They're insulated one from the other, that's the purpose.

Q. So when the wheels of the locomotive going east toward Ravenna struck the insulated strip or rail the circuit would go on?

A. Yes.

Q. Why would it go on?

A. The shorter the track circuit out, and the track relay would drop which in turn lights the signal ahead.

Q. Now in your job as signal maintainer, are you required to inspect the flasher signals?

A. Yes sir.

Q. How often?

A. Interstate Commerce rules are every ten days.

Q. In fact, how often did you inspect them?

A. Once a week I inspect them.

Q. At what time prior to January 2nd, 1952, had you inspected the flasher signals?

A. Well if I was on schedule it would have been on a Friday, that's my routine, as a rule Friday on all flasher signals in my territory.

Q. You would have inspected it the Friday before and the Friday after January 2nd?

A. That's right.

Q. Now as to the flasher signals themselves, would you describe their function and operation, generally, the traffic flasher signals, what is their purpose?

A. For the safety of the traffic moving across the railroad, to warn them there's a train coming.

Q. How are motorists warned of the approach of the train?

A. By the flashing light on the flasher light signal.

[fol. 157] Q. When these flasher lights are on what visible signal is given by them?

A. Two flashing red lights.

Q. Two red lights?

A. Yes.

Q. Any other light?

A. None.

Q. Now to the side or the body of the light itself, are there two white lights showing on the side?

A. Yes, we have windows on the side and that's for the benefit of the trainmen, as they come down they see these white lights flashing and then a light is flashing at the crossing, it's all the same lamp.

Q. So that if you were standing to the side of a flasher light you could still see these white lights flashing as would the red light if you were standing in front?

A. Yes.

Q. I understood you to say a white light was lighted on the top of the approach signal whenever a red or yellow aspect was showing on the signal?

A. That's correct.

Q. A white light only shows when a red or yellow aspect was showing on the signal?

A. That's correct.

Q. A white light only shows when a red or yellow light is showing at the block?

A. Yes.

Q. Now if the white light and the red lights and the yellow lights are all off does that mean that a train is not in the westbound circuit?

A. Yes, on that particular signal, yes sir.

Mr. Guster: I believe that's all.

Cross examination.

By Mr. McGowan:

Q. Of course, a train can come within that circuit any time?

A. Yes sir.

[fol. 158] Q. If there's a train going in the opposite direction, across the crossing, the watchman has to keep watching until that train crosses to see whether another train comes into that circuit, that is part of his duties?

A. Yes.

Q. You are familiar with the Bettles Corners crossing, aren't you?

A. Yes sir.

Q. They have one watchman there on duty, they did have in January of 1952?

A. Yes sir.

Q. They work eight hours? They had three shifts around the clock?

A. Yes.

Q. Now when did they put these white lights on the flashers?

A. What?

Q. When did they put these white lights on the flashers?

A. The white lights?

Q. Yes.

A. They're on all the flashlight lamps, the windows.

Q. Yes.

A. They're on all of them.

Q. How long have they been on?

A. I couldn't tell you.

Q. Now you're familiar with a watchman's duties, of course?

A. Yes.

Q. Of course, generally, they stay in what is known as the watchman's shanty and that's located over on the east, it's east of the tracks, to the south of Tallmadge Avenue, is it not, Bettles Corners?

A. Yes.

Q. When a train comes they receive a signal by a light in their shanty?

A. Yes.

Q. What are the duties of a watchman when they receive [fol. 159] that signal?

A. To come out and try to get the crossing clear of automobiles before the train approaches the crossing. He

has a stop disk and by night uses a green and white lantern.

Q. When a train—say a train is passing and going west, eastbound coming west, he goes to the west side of the crossing?

A. I imagine to see if there's a train approaching the other way, westbound train.

Q. Is that his duty to see if there's a train approaching from the other way?

A. Yes sir.

Q. He's at a more advantageous spot if he goes to the west side of the tracks?

A. That's right.

Q. That way he can look to the left or north or look to the south at that light when the train had passed a certain point where he could see it?

A. Yes.

Q. And it is his duty, until the train which is going east passes the crossing, to stay there to see if there's another train coming that comes into the circuit?

A. Yes.

Q. In order to keep the traffic stopped at that point, if that train comes in that circuit?

A. Yes.

Q. Now you spoke of a light that was located east of the tracks, on the telephone pole?

A. Yes.

Q. And I believe that had a light on it—

A. Yes.

Q. —that flashed, you said, when a train got on a circuit?

A. Yes.

Q. An eastbound train if it got on the circuit could cause that light to flash?

A. Yes.

[fol. 160] Q. While that train was going east, proceeding across the circuit, crossing, even a train coming into the circuit, going east, that light would still flash?

A. Yes sir.

Q. So unless you actually saw the other train or saw the light at Evans Avenue, or saw the train as it rounded the curve, you wouldn't know by that yellow signal that

another train was coming from the east, going west, would you?

A. Not until he got off the crossing.

Q. That's right, not until the train going west got off the crossing. You said something about now that's changed. Do they have another pole?

A. They have put it on a Western Union pole.

Q. Is that a higher pole?

A. Yes sir.

Q. Is that so it can be seen better by the watchman across the street?

A. I don't know if that's the reason. The pole was removed.

Q. They have a new one with a higher pole?

A. Yes, it's on a Western Union pole now.

Q. It's facing at a different angle now, isn't it?

Mr. Reetzal: I object, we're not concerned with that question.

The Court: Yes, sustained.

Mr. McGowan: I think that's all.

Redirect examination.

By Mr. Guster:

Q. These signal windows you spoke of, they were present on the flasher lights on January 2nd, 1952?

A. To the best of my knowledge they were, yes.

Q. For westbound trains approaching the crossing at [fol. 161] Tallmadge Avenue, would a train reach the beginning of the circuit or the curve just to the north of the crossing first, which would a train reach first?

A. You mean the beginning of the circuit or the curve?

Q. That's right.

A. The beginning of the circuit is first.

Q. About how far north of the crossing is that curve located? Where does that curve start going north or east-bound from Tallmadge Avenue?

A. The first curve I imagine is approximately twenty-five rail lengths east.

Q. Mr. Fox, my question is this, I want to determine the distance from the crossing, Tallmadge Avenue crossing, to the beginning of the curve which is just north of Tallmadge Avenue going east, railroad directions?

A. I imagine it's about 800 feet to the beginning of the curve.

Q. And the distance from the crossing to the beginning point of the circuit for westbound trains is how far?

A. Westbound trains it's 2,000 feet plus.

Q. Thank you. That's all.

Recross examination.

By Mr. McGowan:

Q. Maybe I misunderstood. For an eastbound train how far is it from the crossing, how far is the circuit?

A. Approximately 2200.

Q. And then it's 2200 plus for a westbound?

A. No, about 2,000 plus for the flashers and about 3,000 plus for the—

Q. I thought you said 3400 plus. It's a little more than a half mile from the intersection—in other words, if a [fol. 162] passenger train was coming through at the rate of sixty miles an hour it arrives at the crossing in a little more than thirty seconds?

A. Yes.

Q. While there's a watchman, say, on the crossing for a train going east he's got to keep watching to see if there's a train comes into that circuit if there's traffic held up at each side of the intersection?

A. Yes sir.

Q. There's really four corners to that?

A. Yes sir.

Q. Will you tell me why it is why they have a watchman go on the west side of Tallmadge when there's an eastbound train and why they have no watchman there on Home Avenue?

Mr. Roetzel: I object.

Q. Why is it the watchman goes on the west side of the track on Tallmadge Avenue?

Mr. Roefzel: I object. He already answered.

The Court: If he can answer he may.

Q. Just as a matter of curiosity.

A. I imagine because the heavier traffic is on Tallmadge Avenue.

Redirect examination.

By Mr. Guster:

Q. Do you know what the maximum allowable speed for westbound trains is in that block?

A. In that particular vicinity just west of the crossing there's a thirty-five mile an hour speed limit.

Q. And what does a yellow signal mean?

A. You mean to the engineer?

Q. Yes.

A. That's what we call approach, when they approach that signal they reduce their speed half of the maximum. In other words, if it was sixty they'd have to reduce it to [fol. 163] thirty before the next one.

Q. So that trains going west in that block could go no higher than thirty-five miles an hour?

A. Thirty-five miles an hour is the allowable speed, yes sir.

Mr. Guster: That's all.

(Witness excused.)

Thereupon in order to further maintain the issues on its part, the Defendant called as its next witness WALTER A. BEDILLION who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Guster:

Q. Mr. Bedillion, would you address your answers to the lady in the farther corner of the jury box, please, and speak in a loud clear voice.

A. Yes sir.

Q. Would you state your full name?

A. Walter A. Bedillion.

Q. Your address?

A. 335 Third Street, Washington, Pennsylvania.

Q. By whom are you employed?

A. Baltimore & Ohio Railroad.

Q. In what capacity?

A. As an engineer.

Q. Civil engineer?

A. Yes sir.

Q. How long have you been so employed?

A. For five years, from September 15th, 1951.

Q. And where previously had you worked?

A. Equitable Gas Company in Pittsburgh, Pennsylvania.

Q. As an engineer?

A. That's right.

[fol. 164] Q. Where were you educated for engineering?

A. University of Pittsburgh, I graduated in June of 1950.

Q. How long a course was that?

A. Four years.

Q. As an engineer, civil engineer, and surveyor for the railroad, what are your duties, generally?

A. The duties generally of a civil engineer are to go out and line track, stake outsidings for industrial concerns, establish the curves, and also set grade elevations.

Q. Did you make measurements and make a survey or measurements of the various block signals and circuit at the, or near the Tallmadge Avenue-Home Avenue grade crossing?

A. Yes sir, I did.

Q. In Akron?

A. In Akron.

Q. Could you tell the jury the distance south of the crossing at which point the circuit is off or insulated rail is located for eastbound trains?

A. I'll have to get my notes. (Witness gets papers from brief case.)

A. You want that for the eastbound?

Q. For eastbound trains approaching the crossing?

A. About 2,066 feet—wait a minute.

Q. My question is for eastbound trains, that would be west of the crossing, railroad west, but for an eastbound train?

A. Okay. The distance would be about 2215 feet.

Q. When you say "about"—why do you say "about"?

A. The measurements I took, I got the insulated joints on the north rail and the south, and that's the average between the two, to make it 2215 feet.

Q. I take it these are staggered joints?

[fol. 165] A. That's right. The joints are staggered, not opposite one another.

Q. Now continuing on the eastbound track, at what point is the insulated track or portion of the track for the flasher lights?

A. The insulated portion for the flasher lights on the eastbound main track is, approximately seventy-five feet east of the center line of the crossing.

Q. Now for westbound trains or a point east of the crossing, at what point is the insulated track located for the block system?

A. That distance is 3455 feet, that is also approximately due to the staggering of the joint on the north and south rail.

Q. That is the average between the longest and shortest distance?

A. That's right.

Q. Proceeding westbound, how far a distance from the crossing is the insulated rail for the flasher lights?

A. 105 feet. That is also the average distance between the north and south rail, the actual distance east. One is more and one is less, that is from west of the center line of the crossing.

Q. That is the cutoff?

A. Cutoff for the flasher lights, yes sir.

Mr. Guster: That's all.

Cross examination.

By Mr. McGowan:

Q. The flasher lights don't cut off until the train is 105 feet east of the crossing?

A. For a train going east?

Q. If a train is going from Akron to Pittsburgh the flasher lights at the crossing don't cut off until the train is 75 feet from the crossing?

[fol. 166] A. 75 feet from the center, in other words, it would be clear of the crossing. I think the distance from the center line to the edge of the crossing, this is just approximately, is around 54 feet or something like that.

Mr. McGowan: No further questions.

Mr. Guster: That's all.

(Witness excused.)

* * * * *

[fol. 167] OFFERS IN EVIDENCE

Mr. Roetzal: At this time the Defendant offers in evidence the Wheel Report, Defendant's Exhibits D-1, D-2, and D-3.

Mr. McGowan: No objection.

The Court: May be admitted.

* * * * *

[fol. 168] FRED TAMBLING who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Roetzal:

Q. State your name, please?

A. Fred Tambling.

Q. How old are you, Mr. Tambling?

A. 39.

Q. Are you single or married?

A. Married.

Q. Where do you live?

A. Morley Avenue, 463 Morley Avenue.

Q. What is your business or profession?

A. I am a commercial-industrial photographer.

Q. How long have you been a commercial-industrial photographer?

A. About twenty years, sir.

Q. The last twenty years?

A. Yes sir.

Q. Over what period of time have you been a photographer?

A. Probably twenty-five years, sir.

Q. What was your first line of work?

A. I was a staff photographer for the Akron Beacon Journal.

Q. When were you a staff photographer for the Akron Beacon Journal?

A. It was first with the Akron Times Press, actually, before it folded up, and purchased by the Beacon Journal. I started in 1937, worked through the Beacon Journal while I was attending school at the University of Akron as part-time employee and then full-time after I finished school.

[fol. 169] Q. When you talk talk loudly enough so the last lady in the jury box can hear you,

A. Yes sir.

Q. Then after you finished at Akron University and left the Beacon Journal what did you do next?

A. I set up my own business.

Q. Have you been constantly engaged as a commercial-industrial photographer since?

A. That's correct, except for a brief period of army service.

Q. That was when?

A. 1943 through '45.

Q. And what kind of work did you do in the army?

A. I was a camera technician in the Air Force.

Q. What does a camera technician do in the Air Force?

A. I repaired cameras and kept them in good maintenance; installed them in bombers and removed them from bombers after flying missions.

Q. Are you familiar with what is known as kodachrome film?

A. Yes sir.

Q. What is kodachrome film?

A. It's a direct color film which makes it possible to take colored photographs with a direct photographic process, that is you can expose the film in the camera and by a process you have a colored picture.

Q. And by whom is that kind of film made?

A. It's made by Eastman Kodak Company.

Q. Is that one of the larger companies in the United [fol. 170] States?

A. To my knowledge it's the largest in the world.

Q. Now as distinguished from color film is there what is known as black and white film?

A. Yes, black and white film generally is developed as a negative; color film is developed as a positive. When you look at the color film you see the picture as it actually is, as it's rendered to the eye. With black and white it's in reverse. The light portions are black and white.

Q. Is there such a thing in photography as emulsion speed?

A. Yes sir.

Q. What is meant by emulsion speed?

A. It's a relative factor that's determined by national standards, the American standards, and there are other companies who set up their own standards, but generally there are accepted national standards of comparative speeds of one film to another film, it's very much the same as a mirror in an automobile.

Q. What is the emulsion speed of kodachrome?

A. It has a relative emulsion speed of ten which means it's a very slow speed. It requires a longer exposure than do most other black and white film.

Q. Are there variations in the emulsion speed of black and white film?

A. Yes, considerably. They vary only from a relative speed of four as high as two hundred as a standard speed rating for commercial use, they have special developings [fol. 171] that go as high as 8,000.

Q. The ordinary use by the amateur, that which is generally available for sale, what is the probable variation of emulsion speed of black and white?

A. Approximately 50 to 100.

Q. Now does the higher number indicate that it will expose more rapidly or more slowly?

A. The higher the speed film rating the more rapidly it will take a picture. It's equivalent to a car that will go a hundred miles an hour as against a car that will go fifty miles an hour top speed.

Q. If you use a black and white in a slower speed will that register or show on the photograph as many objects as the one with the higher speed will show?

A. Not at the same exposures.

Q. Are you familiar with what is known as a Brownie fixed focus camera?

A. Yes, there are several different cameras actually going under that title, or name, of Brownie, it's a trade name of Eastman Kodak Company.

Q. What is meant by the shutter speed of the camera?

A. The shutter speed is the action which opens and closes an aperture permitting the light to enter the camera and expose the film.

Q. And is that a variable length?

A. Yes it varies with almost all cameras.

Q. Is that true of a Brownie fixed focus camera?

[fol. 172] A. Generally, those in a fixed focus camera the shutter speed is also fixed, variations to from thirty-fifth of a second to a fiftieth of a second.

Q. If you took an exposure holding a camera by hand, what is the longest exposure that you could take without having some movement visible in the picture?

A. For the average person those cameras are set at one thirtieth of a second to a fiftieth the movement will occur. Professional men who are skilled can hold a camera in their own hand if they're braced against an object, and can take at a tenth of a second.

Q. What is meant by taking a picture by flashlight?

A. Generally that's taken at night because there's not sufficient illumination to expose the film. Even the faster films will not take adequate exposures. It's necessary to add a flash attachment to the camera and this flash is synchronized with the shutter so when the shutter is open the flash is at its peak of brilliancy and will light up objects in front of it.

Q. When the picture is taken with a flash what is the fact that objects outside of the focus will show light or dark?

A. If an object at the chair here has a certain registration or measure of light with a meter light from a distance where the gentleman is sitting at the other end, it will be only one-fourth of the light reaching here, it [fol. 173] will be four times stronger at this point than where he is sitting.

Q. If the chair then showed light what would the gentleman sitting there show?

A. It would be dark, in relation to this.

Q. What?

A. It would be dark in relation to this.

Q. While we're on that subject I want you to look at a couple of photographs here—if I can find them—which have been marked Plaintiff's Exhibits 15 and 16, and directing your attention first to 15, can you tell by looking at that how it was taken?

A. I'd say it's a flash snapshot. I believe it's an amateur camera from the size and shape of the print. (Indicating on Exhibit which was handed him by Mr. Roetzel.)

Q. I notice on the right side of 15 there appears to be the door of a motor vehicle which is light in color. Do you notice that? (Indicating.)

A. Yes sir.

Q. In the background it looks dark. Do you notice that?

A. Yes sir.

Q. Now if an object had been outside of the focus, as you have explained in using a flash, would that space behind show dark even though the object would be visible to the human eye?

A. Yes sir, it would, that's true even in the daytime even when flash pictures are taken, pictures taken in the [fol. 174] sunlight using a flash camera with a high speed.

Q. Directing your attention to Exhibit 16, will you look at that and tell us if you can give us an opinion as to what method was used, with or without flash? (Handing Exhibit to witness.)

A. It would appear to be a flash picture again, evidently at some distance from the center of the picture, the camera,

which makes the figures relatively dark. There's a person standing here with a topcoat who is relatively closer to the camera, and the film has more exposure on that portion of the film.

Q. That makes it look black?

A. Yes sir, the same with the car on the right. (Indicating.)

Q. The fact that the background here looks dark and people standing in the background seem to be in the dark, does that show definitely that there was no lighting where those persons were standing?

A. No sir, I could take that same picture in the daytime and almost approximately that same condition, with some qualifications as to my statement, but taking that picture in the dark at night like that the camera without the flash would not record any of the light on the street, to speak of.

Q. That's what I was going to ask you. If you took a picture at night using standard black and white film and using a Brownie Camera, and at a street intersection [fol. 175] where there was lighting furnished by overhead street lights and also the headlights of automobiles, if you took that picture unaided by flash, what would you see on the negative, or the print taken from the negative?

A. Little or no exposure on the film other than perhaps if the light were in the corner of the picture, if the street light were encompassed in the photograph it would show as a tiny spot or blur of light even with a cheap or inexpensive camera with moderately slow film. The exposure insofar as the street or other objects are concerned, wouldn't show, hardly record or be recognizable.

Q. What is the fact as to whether or not at the request of the Baltimore & Ohio you took what is known as kodachrome exposures at the Tallmadge Avenue crossing in Akron?

A. Yes sir, I did take some pictures for them.

Q. What object or objects, particularly, were you taking at the time you made these exposures?

A. I was showing the crossing and the track, some poles along the right-of-way and a signal light in the distance.

Q. And facing what direction, assuming that Tallmadge Avenue runs east and west?

A. I would have been looking south.

Q. And did you cause those to be developed into what are known as the kodachrome transparency?

A. That's correct.

[fol. 176] Q. What kind of a camera did you use?

A. Leica.

Q. Is that a recognized camera?

A. Yes sir, it is.

Q. Does that kind of a camera have what is known as a lens speed?

A. Yes sir, it had a lens, had an F-2 lens in it, also a relative factor similar to the film speeds, that is one lens will transmit more light through it than another lens is capable of doing.

Q. Are those numbered?

A. Yes sir.

Q. When you speak of an F-19 as we do in photography, and an F-35, what do those different numerals mean?

A. Those are relative factors of light speed, the same as the different emulsion numbers of film. They will under any given condition transmit the same amount of light each time that that opening of the lens is used.

Q. Now what was the speed, if I may properly use the word, of the lens used on this Leica Camera?

A. F-2.

Q. Is that considered a fast lens?

A. Relatively so, yes sir, there are other lenses which are faster.

Q. And had you taken photographs before with this camera?

A. Yes I have used similar cameras and similar lenses; even similar lenses on other cameras, of different types.

Q. Using that camera what did you learn as to whether or not using that lens which you used on this occasion, [fol. 177] the transparency resulting correctly showed objects as they would appear to the human eye?

A. Yes sir, with the technical knowledge to operate that camera that camera can very accurately portray what the human eye would see under the same conditions.

Q. Where were you with reference to Tallmadge Avenue at the time you took the photograph?

A. I was in the center line of Tallmadge Avenue.

Q. And what distance from the westbound traffic, if you know what I'm talking about?

A. Yes sir. We picked an arbitrary point which was free from the crossing because there were trains going by on the track close to us. We set up away from that far enough to be safe. We measured the distance to be fourteen foot six inches.

Q. Did you, however, with your eye, move from that point fourteen feet six inches, did you move closer to the track and look at the same object which you were photographing?

A. Yes sir, we made observation by eye to see that the camera would portray the same view in relationship to the signal light anywhere between that point and the tracks. There was one obstruction of a utility pole in which there was one short blind spot we could not see the light because of the pole being in the way, but on either side of the pole, I believe the pole was thirteen feet from the crossing, anywhere from thirteen feet to the crossing light, [fol. 178] the signal light was clearly visible.

Q. Did you produce those transparencies which you made, have you produced them and delivered them to—

A. Yes sir.

Q. To whom did you deliver them?

A. Mr. Meredith.

Q. Would you be able to recognize them if you saw them?

A. Yes sir.

Q. They are here now. I'll state to you professionally that they are the ones, here in this projector, the same ones delivered to Mr. Meredith. (Indicating.)

Mr. McGowan: All right.

Mr. Roetzel: I'd like to have them shown to the jury. In order to do that it will be necessary to darken the room.

(Court Bailiff puts out light in court room.)

By Mr. Roetzel:

Q. Before we actually project—did you take—what day did you take these first?

A. The pictures were taken on the 12th of June.

Q. Of what year?

A. 1956.

Q. Did you take them at different times of the day?

A. Yes sir, the first picture was taken just about sun-down while the sky was still bright enough but the eye would very readily observe all objects in the direction in which we were looking and any series of pictures were [fol. 179] taken periodically as the light waned, as the sunset lowered; the last picture being taken after the sky was completely black and there was no light from the sky to illuminate the picture.

Q. Were those pictures taken aided or unaided by flash?

A. Unaided, there was no flash used.

Q. What was the purpose of taking different films?

A. The first picture was taken to get a bearing on the situation as it appeared to the eye; the successive pictures were taken to show the same identical situation with the same camera settings to illustrate the disappearance of daylight from the scene so the same identical objects in the distance of the signal light would still be in the same position and relatively the same exposure to the camera.

Q. In other words, the position of the camera remained the same?

A. That's correct, sir.

Q. And during daylight it would show not only the signal light, assuming it did that, but also show the other objects?

A. That's correct.

Q. So as the light faded, anyone looking at it would be able to determine it was the same light when no other light was visible, as shown on the other picture?

A. That's correct.

Mr. Roetzel: Show the picture.

(Thereupon Mr. Meredith, Baltimore & Ohio representative, showed pictures.)

[fol. 180] Mr. Roetzel: Is there anything obstructing the view of the jury?

(Silence.)

Mr. Roetzel: This first one we'll mark Defendant's Exhibit E.

(Defendant's Exhibit E, transparency, marked.)

By Mr. Roetzel:

Q. Calling your attention to Defendant's Exhibit E I'll ask you whether or not that is a transparency made from one of the films you caused to be exposed when you took this photograph? (Handing Exhibit to witness.)

A. Yes sir, it is.

Q. I notice over here on the extreme right, upper right, it says "ROC," and "CO," what building is that?

A. Acme Grocery Warehouse and office building.

Q. Is that Albrecht's?

A. Yes sir.

Q. Down here at a greater distance is a building, can you tell us what building that is? (Indicating.)

A. Schulman Rubber Company, it's a scrap rubber firm.

Q. I notice a light, what seems to be a light object on that building, what is that? (Indicating.)

A. I believe that's a light in the storage yard, it's a white light that's illuminated.

Q. Electric light?

A. Yes sir.

Q. Now what is the light which is shown between the two telephone poles, or whatever kind of poles they are? [fol. 181] (Indicating.)

A. That's the signal light in question.

Q. And the railroad tracks which are shown on the left front, or lower left lower section of the photograph extending toward the middle, what tracks are those? (Indicating.)

A. Baltimore & Ohio tracks, sir.

Q. And what is this object? (Indicating.)

A. Signal crossing, signal light.

Q. These two with the two black marks or circular disks, what are those? (Indicating.)

A. Those are the reflectors or actual holders of the lights that flash on and off.

Q. This round circular disk which is supported here, looks to be orange or yellow, what is that? (Indicating.)

A. Traffic stop sign.

Q. Now does that photograph correctly portray the objects shown on it as they would have appeared to the human eye at the time they were taken?

A. Yes sir, as closely as it's possible to approximate with the camera under the conditions under which we photographed.

Q. What elevation above the pavement was the camera at the time the picture was taken?

A. The lens was five-foot-six inches.

Mr. Roetzel: I think that's all for that.

The Court: Do you have any objection if Mr. McGowan were to cross examine on the slide?

[fol. 182] Mr. McGowan: I'll wait. I prefer to wait, if it's all right with you.

Mr. Roetzel: If at any time you wish to ask a question feel free to do so. Mark this Exhibit, Defendant's Exhibit F.

(Defendant's Exhibit F, Transparency, was marked.)

(Mr. Meredith shows Defendant's Exhibit F on screen.)

By Mr. Roetzel:

Q. Referring to Defendant's Exhibit F, what is this, a photograph of the same scene? (Indicating.)

A. Yes sir, it is.

Q. Is it taken from the same relative position?

A. Yes sir, it is.

Q. And is there more or less daylight at the time this Exhibit F was taken?

A. The sun was setting somewhat lower than in the first picture and the view is somewhat darker.

Q. Except for that, the conditions are the same as Exhibit E?

A. Yes sir.

Mr. Roetzel: Mark this Defendant's Exhibit G.

(Defendant's Exhibit G, Transparency, marked.)

Q. Now is this taken under the same conditions except less daylight?

A. That's correct, sir.

Q. And the lights, of course, shown on the preceding one, F, and this, are the same lights as were shown on the other one? (Indicating on picture shown by Mr. Meredith.)

A. That's correct.

[fol. 183] Mr. Roetzel: Mark this Defendant's Exhibit H.

(Defendant's Exhibit H, Transparency, was marked.)

Q. This is taken under the same conditions as the other. See the pole and crossarm, you see the lights? (Indicating on picture, Exhibit H, Transparency, being shown by Mr. Meredith.)

A. That's correct.

Q. The intensity of the light, that amount of light admitted was the same as when these were taken before?

A. Yes sir.

Q. The only thing it shows more vividly now because of the increasing darkness?

A. That's correct.

Mr. Roetzel: Mark this Defendant's Exhibit I.

(Defendant's Exhibit I, Transparency, was marked.)

(Mr. Meredith shows picture, Defendant's Exhibit I.)

By Mr. Roetzel:

Q. We're up to I. I am unable to distinguish any objects except the two lights. What was the condition of natural lighting at the time this was taken?

A. There was no daylight left; the sky was black, there were only those two lights that were still within the view of the camera; there were no other lights visible to the eye within the view of the camera.

Q. And the lights which are shown on here, were they plainly visible to you as you stood in the center of Tallmadge Avenue at the time? (Indicating.)

A. Yes sir.

Q. What were the atmospheric conditions at that time? [fol. 184] A. The sky was clear, as I recall, yes sir. There was some little haze in the sky itself. As the pictures progressed that wasn't increased or decreased. The condi-

tions of this picture were the same as the first picture except for the difference in the daylight present.

Q. Tell the jury whether or not that is the view which one would have if you stood two or three or four or five feet west of the west rail of the westbound traffic in the middle of Tallmadge Avenue looking down the track toward Akron?

Mr. McGowan: What day?

Mr. Roetzel: June 12, 1956.

A. Yes sir.

Mr. Roetzel: That's all.

Cross examination.

By Mr. McGowan:

Q. You were asked to look at Plaintiff's Exhibit 15 and 16. The officer testified he had a flashlight in his hand there and that's what made that light. Would that do that, that little (handing Exhibit to witness.)

A. This is the flashlight down here.

Q. Yes, he said he had the light. Can you observe that?

A. Yes sir, it would show.

Q. Does light show in the pictures then?

A. Yes sir, the other is a speck of dirt on the print. (Indicating.)

Q. I notice when you took the pictures in the daytime [fol. 185] the scene was more visible, the scenery around. Why is that more visible than it was when you took the picture at night?

A. What do you mean?

Q. How does it happen when you took the picture at night you couldn't get the pictures of the Rubber Company there, and the Acme Store?

A. Because there was no light on those subjects, the daylight was gone, there's not sufficient light anyway to illuminate the film for the camera to pick it up.

Q. There was some lighting, I take it, at the intersection on the night you took this picture?

A. Yes, but very little, the normal street lighting.

Q. Where was that street lighting? You were standing in the middle of Tallmadge Avenue about three feet west of the track, is that right, westerly track?

A. We made observation from the track out to the fourteen foot six inches where we took the pictures, sir.

Q. Well did you observe—you took into consideration the street lighting when you took these pictures?

A. No sir, we did not.

Q. You knew there was some street lighting there?

A. We didn't observe it, I did not take it into consideration at all.

Q. Well did you see any street lights up there?

A. Only what I recall from vague observation. I didn't [fol. 186] pay any particular attention to make any note or record in my mind whatever.

Q. Are these the only pictures you took that night?

A. No sir, there were some others taken of another series of the same identical thing. We took five exposures using the same camera lens setting, we took different length exposures which gave relatively the same identical net result.

Q. How many other pictures did you take other than the ones shown here?

A. I don't recall. I think sixteen or eighteen altogether.

Q. You have those pictures?

A. No sir.

Mr. Roetzel: We have them. I'll state to you professionally they are duplications of these.

Mr. McGowan: I wonder if we could see those pictures?

Mr. Roetzel: Yes. We don't have them here; I'll be glad to have them brought over.

Mr. McGowan: Will you come down here just a minute.

Mr. Tambling, I want to start to show these pictures again.

The Court: Can you work the camera?

Mr. Tambling: I believe I could, I'm a cameraman, not a projectionist, sir.

(Witness shows pictures on screen.)

[fol. 187] By Mr. McGowan:

Q. In taking these pictures did you make a general observation of everything in front of your camera?

A. Relatively so, yes sir.

Q. Now I see there's a pole here at this place. Where is that pole? This is Home Avenue here, is it not? (Indicating.)

A. Yes sir, that's where Home crosses the track into Tallmadge.

Q. This is coming from the south as it crosses the track?

A. Yes sir, slightly southwest.

Q. This is a pavement here that leads over to Tallmadge, is that right? (Indicating.)

A. Yes sir.

Q. Now you spoke of this being a utility pole. What was on that pole? (Indicating.)

A. I did not make that observation, sir, the utility pole I was referring to was the one in the distance.

Q. I see down here there's a curve. Do you know how far that curve is, the start of that curve to the south pavement? (Indicating.)

A. No sir, I do not, the survey should show that information.

Q. I think you said there were some trains on the crossing when you got there?

A. We were expecting trains to be using the crossing.

Q. Maybe I misunderstood you. I thought you testified there were some trains and you stepped back?

A. We were expecting some trains to go through there; [fol. 188] according to the schedule some were going through that.

Q. Did any trains go by while you were there?

A. Several.

Q. Which way did the trains travel?

A. Most of them were going in the direction the picture was taken, there were one or two going the other direction.

Q. So the trains traveled in both directions while you were there?

A. That's correct.

Q. Were you asked to take any pictures of any trains

that were coming from the south and going north or, in railroad parlance, coming from the west and going east?

A. No sir.

Q. Now if I were to show you a picture of this utility pole that was taken in the daylight, handing you what has been marked as Plaintiff's Exhibit 8, I'll ask you if that is the pole that is shown in the right corner of that picture?

Mr. Roetzel: Is this Exhibit in evidence?

Mr. McGowan: Not yet. Let Mr. Roetzel see that. (Witness hands Exhibit to Mr. Roetzel.)

Q. When you were out there that night did you notice this utility pole here? (Indicating.)

Mr. Roetzel: I want to object, I don't think that's sufficiently relevant to the issue here.

The Court: Just a minute, what pole do you mean, this [fol. 189] pole here? (Indicating.)

By Mr. McGowan:

Q. Just a minute. Can you tell the jury by looking at Plaintiff's Exhibit 8 whether or not this pole which I am pointing to, which appears in the right corner of this picture, is shown on Plaintiff's Exhibit 8? (Indicating.)

Mr. Roetzel: Object. There are other photographs which show the same pole.

The Court: He may answer. Cross examination.

By Mr. McGowan:

Q. It's a bit confusing, this picture is taken from the opposite direction, it confuses me, whether this is the pole or this. (Indicating.) You see this picture? (Indicating.)

A. Yes sir.

Q. These are the tracks. Do you recognize these tracks as the tracks looking east in the opposite direction from which you took that? (Indicating.)

A. Yes.

Q. Do you recognize this down here as the crossing? (Indicating.)

A. Yes.

Q. Looking at this picture and looking at the picture which is now shown on the screen I will ask if you can point on this picture and show which one of these poles is now shown in the picture on the screen? (Indicating picture on screen.)

A. I'm afraid I couldn't. It's too confusing from the angle of your picture to the angle of my picture. I couldn't identify that pole, no sir, I could not. It could be either [fol. 190] this pole or this pole. (Indicating.)

Mr. Roetzel: Let the record—

A. I couldn't tell.

Mr. Roetzel: Let the record show when the witness says "It could be this pole or this pole," he is pointing to two poles which are shown on the left hand side of the Exhibit about which he is being interrogated, on Exhibit 8.

By Mr. McGowan:

Q. Now I will hand you what has been marked as Plaintiff's Exhibit 7. (Handing Exhibit to witness.) I will ask you if you can identify Plaintiff's Exhibit, the pole which is shown on the right here in this first Exhibit? (Indicating on Exhibit handed to witness.)

Mr. Roetzel: I object, because it doesn't make any difference.

The Court: Overruled.

A. I'm afraid I still couldn't make that identification. The pole in this picture doesn't have sufficient stature to identify it, sir.

Q. Well that's a clear picture?

A. Yes sir, but taken from a different angle.

Q. This is Home Avenue, is it not?

A. Yes.

Q. You recognize that as Home Avenue? (Indicating.)

A. Yes sir, looking east.

Q. Looking northerly wouldn't that be looking northerly?

A. Yes sir.

[fol. 191] *Q. And you see the Fred B. Albrecht Building?
(Indicating.)

A. Yes sir.

Q. See the shanty there? (Indicating.)

A. Yes sir.

Q. And you see the Well Craft Company?

A. Yes sir.

Q. And you see a telephone pole here right at the intersection of that turn? (Indicating.)

A. Yes sir, but it still could be this pole or this pole.
(Indicating.)

Q. You can't tell then by looking at Plaintiff's Exhibit 7 which pole that is?

A. No sir.

Q. Now I will refer you to Plaintiff's Exhibit 5, I'll ask you to look at Plaintiff's Exhibit 5, do you recognize the picture that that scene portrays? (Handing Exhibit to witness.)

Mr. Roetzel: I object.

The Court: Overruled.

A. It's looking up the tracks in an easterly direction.
(Indicating on Exhibit.)

Q. Is that the way that crossing looked the day you were out there to take these pictures?

A. Yes sir.

Q. And is that a true and correct representation of the crossing, as so much of it is shown by the picture, as the day you were out there?

A. Yes sir.

Q. Going back to Plaintiff's Exhibit 7 I will ask you if that is a clear picture? (Indicating.)

A. Yes sir.

Q. Is that a true and correct representation of the crossing as it is shown there on the day you were out there?

A. Yes sir.

Mr. McGowan: Outside of seeing the other pictures, I have no more questions.

Redirect examination.

By Mr. Roetzel:

Q. One more question. Mr. Tambling, you testified at one place that there was a blind spot because of the utility pole. Will you point out the pole which caused that blind spot?

A. Yes sir. When taking the pictures I stepped a foot or foot and a half toward the tracks and this pole, utility pole, I was referring to blocked the light; stepping forward to the light the track again became visible. (Indicating.)

Q. For what distance on the pavement did that pole block out the light?

A. Approximately a foot, foot and a half.

Q. So when you got beyond that pole a foot or foot and a half east the light was not blocked?

A. That's correct.

Mr. Roetzel: That's all.

Mr. McGowan: I want to examine him.

Mr. Roetzel: I'd like to adjourn the Jury for just a few minutes.

The Court: The Court charges you not to talk to anyone or allow anyone to talk with you, or listen to any conversation pertaining to the subject matter of this trial; nor express nor form an opinion thereon until after the case is given you for final deliberation. Remembering that admonition, you will be recessed for fifteen minutes.

RECESS

Recross examination.

By Mr. McGowan:

Q. I have just one or two questions. Now when you were out there on June 12th, 1956, were you alone or was someone with you?

A. Mr. Meredith was with me.

Q. Dean Meredith?

A. That's right. I had an assistant with me.

Q. Were you instructed where to take these pictures, where to stand?

A. No sir.

Q. Were you given any instructions as to the place where your camera was to be located when you took the pictures?

A. No sir.

Q. Who determined where to take the pictures?

A. I was told to take that signal light in the distance and show its position to the crossing.

Mr. Roetzel: The Defendant has now produced all the transparencies which were delivered by the witness, Mr. Tambling, except those which have been previously projected. Counsel for the Plaintiff has viewed them in the [fol. 194] absence of the jury.

Mr. McGowan: I wonder if you will show to the jury Number 8.

Mr. Roetzel: Number 8? Will that be Plaintiff's?

Mr. McGowan: Yes.

(Mr. Roetzel hands picture to jury.)

Mr. Roetzel: Mark this Defendant's Exhibit J.

(Defendant's Exhibit J, Transparency, marked.)

(Defendant's Exhibit shown on screen by Mr. Meredith.)

Mr. McGowan: Will you go to the picture there, Mr. Tambling, and will you tell the jury what this light is over there that appears on the extreme right hand side of the picture?

A. I don't know.

Q. You know what the next light is that appears from the right? (Indicating.)

A. It appears to be headlights of a vehicle, but I'm not certain.

Mr. McGowan: All right. Now we'll have Exhibit K.

Mr. Roetzel: No, I want them numbered consecutively as they appear in the projector. Having them brought here I want them all to be available to the jury.

Mr. McGowan: They'll have to be re-numbered.

(Discussion off the record.)

Mr. Roetzel: Mark these Defendant's Exhibits K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC.

(Defendant's Exhibits, marked K, L, M, N, O, P, Q, R, [fol. 195] S, T, U, V, W, X, Y, Z, AA, BB, CC, Transparencies, were marked.)

Mr. McGowan: Now slide 16—this is Defendant's Exhibit R. Now will you show that.

(Mr. Meredith shows picture on screen.)

By Mr. McGowan:

Q. We again see a utility pole on the right side of the picture, do we not?

A. That's correct.

Q. Now I see an object five or six inches from the utility pole to the left of the picture. What is that object, if you know?

A. I would say it's a globe from a light.

Q. Do you know that's a globe from a light?

A. I don't know. I assume it is from the position, on the picture.

Q. Will you show slide 18? That's Exhibit T.

(Mr. Meredith shows picture on screen.)

Q. Now referring to this Exhibit, Defendant's Exhibit T, I see a light at the top of the picture. Tell us what that is?

A. I take it to be the same street light, a globe hanging there. I should mention, too, these pictures to which you were referring as seeing street lights were taken with a Rollachord which has a top lens speed of 635 with a film which is very similar to kodachrome except it's faster motion with a speed of 32 I believe.

Q. Is there any reason why you took this picture with [fol. 196] a different camera, than the others?

A. No sir, why this set was chosen by the counsel over the other set, I don't know.

Q. You now have a definite recollection of a street light on this utility pole which is in the corner of the pole?

A. No sir, I don't have a definite recollection, only it's in the picture.

Q. Does that refresh your recollection?

A. No sir, it does not.

Mr. McGowan: Will you put the lights on again.

(Court Bailiff puts lights on in court room.)

Mr. Roetzel: Is that all you want shown?

Mr. McGowan: Yes.

By Mr. McGowan:

Q. Going to Plaintiff's Exhibit 7 I'd like to have you mark this pole as "A" if you will, please.

Mr. Roetzel: Object for the same reason, it doesn't make any difference in this lawsuit.

The Court: Overruled.

A. This is "A." (Witness marks.)

Q. Now mark this pole here "B", if you will, please.

A. (Witness marks.)

Q. Now I'll ask you if the light which you described from the utility pole in Plaintiff's Exhibit T which was just shown isn't the same pole that is pictured on Plaintiff's Exhibit 7, and just marked by you with a "B." (Indicating.) [fol. 197] A. It would appear to be so, yes sir.

Mr. McGowan: That's all.

Redirect examination.

By Mr. Roetzel:

Q. Would the presence of that light, Mr. Tambling, in any way affect the correct portrayal of the objects shown on the various slides?

A. Not insofar as the exposure on the film is concerned, more particularly on the flash pictures shown to me first, it would have no effect whatever on the film taken with that Brownie Camera, it wouldn't affect that picture.

Mr. Roetzel: That's all.

(Witness excused.)

Thereupon in order to further maintain the issues on its part, the Defendant called as its next witness THOMAS WAKEFIELD who, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Roetzel:

Q. You may state your name?

A. Thomas Wakefield.

Q. You are a police officer in the City of Akron, Ohio?

A. Yes sir.

Q. How long have you been a police officer?

A. Eight years.

Q. On the 2nd of January, 1952, what kind of duty were you assigned?

A. Traffic, accident control.

[fol. 198] Q. What means of transportation did you have at that time?

A. Police Traffic Cruiser.

Q. Did you operate it alone or with someone?

A. I worked with another officer.

Q. And his name?

A. Vincent Blanco.

Q. On the early morning of the 2nd of January, 1952, did you go to the Talmadge Avenue-Home Avenue crossing of the Baltimore & Ohio track?

A. Yes sir.

Q. Was Mr. Blanco with you?

A. Yes.

Q. Did you take some photographs there?

A. Yes we did.

Q. What kind of a camera did you use?

A. That was a small Brownie Camera.

Q. Do you know what the lens speed was, that is the shutter speed?

A. No sir, I don't.

Q. You don't know what it was?

A. No sir.

Q. Do you know what the aperture opening was?

A. No sir.

Q. Do you know the emulsion speed of the film?

A. No sir.

Q. You just had a Brownie Camera with some film you had purchased and you took a snapshot there, is that correct?

A. That's right, with film that's furnished by the Police Department.

Q. Did you use it in taking the picture, did you use a [fol. 199] flashlight?

A. Yes, flash bulb.

Q. Directing your attention, Officer, to what has been marked as Plaintiff's Exhibits 15 and 16, do you recognize those photographs? (Handing Exhibits to Witness.)

A. Yes I do, that is my writing on the back, I marked the pictures.

Q. I notice you have "12/31/51" marked on there. That was a mistake?

A. That was evidently a mistake. That was the 2nd day of the New Year. I had been used to putting "51." That was a mistake.

Q. These are the photographs you took with a flash? (Indicating.)

A. Yes sir.

Q. Have you had much experience in taking photographs with a flash bulb at that time, January 2 1952? Had you had some experience?

A. I can say no, I haven't had a lot of experience. Some.

Q. All right. When you arrived at the crossing Mr. Inman, the crossing watchman, was still there?

A. Yes.

Q. And were you able to see objects around there at that time?

A. Yes.

Q. In other words, what was the lighting at that time?

A. The lighting was the same as any ordinary intersection markings at night.

Q. Were there automobiles there also?

A. Yes there was traffic.

Q. And did those have their headlights lighted?

[fol. 200] A. Yes.

Q. Now did you talk to the Plaintiff?

A. Yes.

Q. Did he make any statement to you?

A. Yes, he gave me a statement of what happened.

Q. Will you tell the jury what Mr. Inman said to you?

A. Very well, if it's permissible I'll read it off the photo-static copy.

Q. You have in your hand the copy of a collision report?

A. A copy of the original report. (Indicating.)

Q. I notice on it written the word "Wakefield." Whose signature is that?

A. That's my signature. The officer making the report, and typing the report, signs his signature.

Q. When was that report made?

A. Approximately an hour and a half after the accident and the addition was made, the additional part was made approximately three and a half hours after the accident.

Q. And what you put on that report—you may tell the jury whether you correctly placed on that report what Mr. Inman said to you?

A. Very well.

Q. That was January 2nd, 1952. Do you have a personal recollection now of what he said to you?

A. Without referring to the report, no.

Q. All right. Therefore, if you desire to do so for the purpose of refreshing your recollection as to what he said, [fol. 201] you may refer to the report and tell the jury what Mr. Inman said to you?

A. Mr. Inman states he "was standing in the middle of the intersection with a lantern in each hand holding traffic up for a train that was passing through the intersection. After the train had passed through I turned to direct the eastbound traffic on Tallmadge Avenue to proceed on. All at once I was struck. I did not see the car that struck me."

Q. That is, "after the train had passed I turned to direct eastbound traffic on Tallmadge Avenue to proceed on. All at once I was struck. I did not see the car that struck me." Now did you later take some photographs of an automobile?

A. Yes.

Q. And what automobile was it that you photographed?

A. The automobile that struck Mr. Inman.

Q. And where were those photographs made?

A. I believe they were taken in front of the police station.

Q. Directing your attention to what has already been marked as Plaintiff's Exhibit 17, I will ask you to examine and tell us whether you recognize that photograph? (Handing Exhibit to witness.)

A. Yes I do.

Q. By whom was the picture taken?

A. That was taken by me.

Q. And by the same camera?

A. Same camera.

[202] Q. Was that taken by flash or taken in the daylight?

A. Flash.

Q. Does that photograph correctly show the front of the automobile, shown on the photograph, as it appeared to the human eye at that time? (Indicating.)

A. Yes.

Q. I notice that this has on it a license number which appears to be E-2299-A. Does that number appear on your report? (Indicating.)

A. That's the same license number that's on my report.

Q. In other words, that is the automobile which collided with the Plaintiff, Mr. Inman?

Mr. McGowan: Object, unless he knows.

The Court: Sustained, strike it.

Mr. McGowan: I'll withdraw it.

Q. Directing your attention to the front of the hood of this automobile just what would be to the left of the right front headlight, it seems the automobile looks a little darker, what is that? (Indicating.)

A. The darker spot is where some object or material—the car was dusty or dirty, and evidently it's where some material or something or other had brushed the car and cleaned away the dirt from the car.

Q. Now I notice down on the bumper itself, a portion that looks black or darker which is toward the right side of the bumper, then another place that looks darker inside, what would be to the right of the license tag on the auto-

[fol. 203] mobile but to the left, as you look at the photograph, what are those darker spots? (Indicating.)

A. I cannot state now. I don't remember what that was.

Q. Was that bumper also dirty?

A. Yes, the car, generally.

Q. I don't know if this will refresh your recollection, do you remember now whether there were places the dirt had been rubbed off—

A. No I can't.

Q. —the bumper?

A. No I can't.

Mr. Roetzal: I think that's all. Thank you very much.

The Court: Mr. McGowan?

Cross examination.

By Mr. McGowan:

Q. Officer Wakefield, Plaintiff's Exhibits 15 and 16, do they correctly portray the scene that is shown on those pictures?

A. Yes.

Q. I believe you were the one that took the pictures, were you not?

A. Yes sir.

Q. Now does your report show Mr. Inman told you he was walking south at the time he was hit?

A. No, my report indicates he had turned to direct traffic, for eastbound traffic, to wave eastbound traffic on.

Q. You talked to him right at the scene, did you?

A. I believe I talked to him at the hospital.

Q. He was in pretty bad shape at the scene, wasn't he?

[fol. 204] A. Yes.

Q. You talked to him at the hospital. What was his condition when he got to the hospital?

A. It was considered serious.

Q. Did he tell you that he saw this car before it hit him?

A. He saw nothing according to his statement.

Q. Your report shows that he told you when he turned he was hit all at once?

Mr. Roetzal: Object. The report speaks for itself.

The Court: Go ahead.

Q. Doesn't your report show he was hit all of a sudden?

A. Yes, he didn't know what hit him.

Q. He didn't see the car before it hit him, too?

A. That's right.

Q. Now this report that you made up, of course, wasn't made up at the scene, was it?

A. It was made in longhand and notes, and so forth.

Q. Then you went to the hospital and later you went to the station, I take it?

A. Yes sir.

Q. I think it was sometime later that morning that Jim Ball came over to the station, did he not?

A. Yes.

Q. And on your report, I believe the statement that you took from Jim Ball appears before the statement that you took from Mr. Inman, does it not, on the report itself?

A. That's right, the statement from the driver, Mr. Ball. [fol. 205] Q. That would indicate you recorded his statement, Jim Ball's statement, before you recorded Mr. Inman's statement?

A. Yes sir.

Q. Do you remember what time it was that Jim Ball came to your station that morning?

A. 4:00 o'clock according to my report.

Q. You talked to him about this, didn't you?

A. Yes.

Q. What did he tell you?

Mr. Roetzel: I object.

The Court: He may answer that.

Q. What does your report say?

Mr. Roetzel: I object.

Mr. McGowan: I'm not offering this report.

The Court: You are not?

Mr. McGowan: I have a right to refresh the witness's recollection.

Mr. Roetzel: Only what's collateral.

Mr. McGowan: Do you object to that?

Mr. Roetzel: Certainly, what he said.

Mr. McGowan: You offered what was supposed to be a report in evidence.

Mr. Roetzel: You objected to it, you put me to the trouble of producing the officer. Now he's here to testify.

Mr. McGowan: That's all.

* * * * *

[fol. 206] The Court: Mr. Roetzel.

OFFERS IN EVIDENCE

Mr. Roetzel: I want to offer in evidence Defendant's Exhibits E, F, G, H, and I, which are the Kodachrome Transparencies.

The Court: Any objection?

Mr. McGowan: No.

The Court: May be admitted.

Mr. Roetzel: Do you want to offer the others in evidence? I'm willing to have them in by joint agreement?

Mr. McGowan: 16 and 18--I think they were J, R, and T.

Mr. Roetzel: The Plaintiff offers J, R, and T, and the Defendant agrees.

The Court: May be admitted.

Mr. Roetzel: I also want to offer in evidence Plaintiff's Exhibit 17 which is the automobile concerning which the witness testified.

The Court: All right.

* * * * *

[fol. 207] Mr. Roetzel: Joint Exhibit A wasn't offered by anyone. We offer it in evidence.

The Court: Any objection?

Mr. McGowan: At this time I don't but I'd like to think it over until I come back this afternoon.

Mr. Roetzel: It's a Joint Exhibit.

Mr. McGowan: I won't object to it.

The Court: The map may then be admitted into evidence.

* * * * *

[fol. 208] FOWLER ROBERTS, M.D. who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Roetzel:

Q. You may state your name, please?

A. Dr. Fowler Roberts.

Q. Talk loudly.

A. I'll try to.

Q. You are a doctor of medicine, licensed in the State of Ohio?

A. Yes sir.

Q. How long have you been licensed, Doctor?

A. Since 1920.

Q. What school are you a graduate?

A. Indiana School of Medicine and University of Pennsylvania.

Q. Did you take any postgraduate work any place?

A. I did.

Q. Where?

A. University of Pennsylvania Graduate School.

Q. When was that, Doctor?

A. 1929 to 1931.

Q. Did you serve any internship anywhere?

A. I did.

Q. Where?

A. City Hospital, Indianapolis.

Q. When was that?

A. 1927 and '18.

Q. Have you been engaged in the practice—how long have you been actively engaged in practice in Akron?

A. Since 1920.

Q. Have you specialized in any field?

A. I have.

[fol. 209] Q. What field do you now specialize?

A. Orthopedic Surgery.

Q. What is Orthopedic surgery?

A. Orthopedic surgery is the disease and injuries of bones and joints.

Q. How long have you specialized in Orthopedic surgery?

A. Since 1931.

Q. And have you practiced continually in that field since that time?

A. I have.

Q. Is it a fact that you were called by the Baltimore & O Railroad Company to treat the Plaintiff in this case, Mr. Carl Inman?

A. I was called by Dr. Harvey Musser to see this patient.

Q. Dr. Harvey Musser is a surgeon for the Baltimore & Ohio Railroad Company?

A. That's right.

Q. And did you treat the patient and Plaintiff, Mr. Inman, immediately after his injury, or at a later date?

A. A short time after his injury.

Q. And where was he at the time you first treated him?

A. St. Thomas Hospital here in this City.

Q. By referring to that record, a copy of which is here—I guess it's the original—as a matter of fact—it's been identified as Plaintiff's Exhibit 33, can you tell us when it was you first treated the patient? (Handing Exhibit to witness.)

A. January 5th, 1952.

Q. And did you treat him thereafter, continually, I mean, [fol. 210] did you act as his Doctor continually thereafter?

A. No, I saw him on this date at St. Thomas Hospital in consultation with Dr. Musser; a few days later, I think the 13th, he was transferred to the City Hospital and was transferred to my care at that time.

Q. So he was not actively under your care while he was in St. Thomas Hospital?

A. He was not.

Q. He was under the care of Dr. Musser during that time?

A. That's right.

Q. Now from the time that you first examined him, I wish you'd tell the jury what his condition was as to the bone anatomy?

A. He had an injury to his left leg which by physical examination and X-ray indicated that he had a fracture of both the tibia and the fibula, that is, the two bones running from the knee down to the ankle, about the junction

of the mid and distal thirds, on the front of the leg there was a small opening in the skin which would then lead us to call this a compound fracture because the skin was broken. A compound fracture does not mean a lot of multiple fragments in the fragment, it's simply that the skin was broken. This had been compounded from the inside, in our opinion, because a small area of the skin was broken. The fibula was broken in several small pieces at the site but was not compounded. On the right knee he complained of pain in the knee joint and there he had swelling and tenderness and an X-ray showed he had a [fol. 211] fracture through the tibia which is the large bone running from the knee down to the ankle, and that was fractured into the knee joint.

Q. Now was anything done with reference to, as a layman would say, "setting the bone" or as you would say "reducing the fracture"?

A. As soon as I took over the care of the patient at the City Hospital the right leg was put in traction for the fracture of the tibia at the knee joint; the left leg we did what is known as an open reduction. We operated on the fracture site to reduce the fracture and in this case we put a little metal pin in which runs down through the bone to hold the two bones together.

Q. And were X-rays taken of the bones, concerning which you have testified, after the reduction?

A. There were.

Q. And what did those X-rays disclose?

A. They disclosed a very good reduction of the bones after the operation.

Q. What do you mean by a "good reduction"?

A. Well there's two types of a good reduction, one is a satisfactory reduction so that the bone will heal, and the other which is much less important is one that shows a pretty picture in the X-ray.

Q. Now looking at the hospital record of the City Hospital, I notice here an X-ray interpretation by Dr. C. H. Bernard, M.D. Was Dr. Bernard a doctor connected with the X-ray Department at the City Hospital at that time? [fol. 212] This is dated January 17, 1952. He states "Portable studies of the left tibia and fibula taken in surgery,

shows an intramedullary nail immobilizing the fractured tibia, junction of the mid and distal thirds. The alignment of the fragments appear excellent." What does that language mean, "The alignment of the fragments appear excellent."

A. It means the edges of the bones in this picture came in line, for example, this is not in line, this is in line. (Indicating.)

Q. Now you spoke of a comminuted fracture of the fibula. Would you describe it to the jury?

A. I think I described it. A comminuted fracture is one that has several small fractures at the site of the fracture.

Q. And the fibula I think you said is the small bone between the knee and the ankle?

A. That's right.

Q. Which is the one we call the shin bone?

A. The tibia?

Q. The fibula is the little one behind, that's the one we call the fibula, and that's the one that had the comminution?

A. That's right.

Q. This same explanation, "Without gross displacement of the fragments." What does that mean?

A. It means these small fragments were close together, not greatly dispersed.

Q. Now I notice here in another interpretation which is dated the 12th of March, 1952, made by Dr. C. F. Tatum, [fol. 213] Is he a doctor connected with the X-ray Department of the City Hospital?

A. Yes.

Q. He speaks of "old healed comminuted fracture through the epiphysal" — is that the way you pronounce it?

A. Yes.

Q. "line of the right tibia and through the lateral tibial plateau with residual depression of the articular surface of the lateral tibial plateau, one centimeter. There is some widening of the fragments of the right tibial plateau." What does he mean by an old healed comminuted fracture?

A. Well "old" of course, using it in that sense is a relative term, it depends on the fracture, it could be called old at three months or it could be called old at three years. This was about three months after the injury.

Q. This was the 12th of March which would be two months and ten days after the occurrence?

A. That's right.

Q. He speaks of it being a "healed fracture." What do you mean by being a healed fracture?

A. Well a fresh fracture is not healed, a new fracture, or a fresh fracture is not healed when it occurs; and after it's healed then it can be called an old fracture; it could be called old at three months or at six months or three years.

Q. Does that indicate that on the 12th of March, 1952, this fracture, comminuted fracture, was actually healed?

A. That's an interpretation of the healing at that time.

[fol. 214] Q. Yes. Well so far as X-ray would show, does that indicate the fracture was healed?

A. From an X-ray standpoint.

Q. That's what I mean, so far as X-ray—

A. That's right.

Q. Now how long did you continue to treat Mr. Inman in the hospital?

A. May I refer to my notes?

Q. Yes, you may refer to any records you wish. If you want to look at this hospital record—

A. He was discharged from City Hospital 4/8/52.

Q. Was Mr. Inman bedfast during a portion of his hospitalization there?

A. Yes.

Q. For what period of time?

A. I can't tell you exactly. He was in traction and later put in a brace and at that time he was gotten up in a wheel chair, if I remember correctly, and later crutches; wheel chair and later crutches.

Q. Now what was done besides the reduction of the fracture, what was next done?

A. You mean immediately after the operation?

Q. Well during the course of your treatment?

A. He had plaster casts, following his operative reduction and while in traction, on his right leg; following traction he had a brace.

Q. Was that approved practice at that time—

A. It is.

[fol. 215] Q. —for treatment of a fracture of that kind?

A. It is.

Q. And the purpose of that was what, to immobilize it?

A. Immobilize the fragments.

Q. During the healing process?

A. That's correct.

Q. Was that cast replaced at any time?

A. Yes. The first week of May the cast was removed and a new one put on.

Q. Which leg?

A. Left leg.

Q. When was the cast then removed finally?

A. The cast was removed and X-rays made at City Hospital at that time and on the 10th the cast was completely removed, and he was instructed to use crutches and light weight-bearing.

Mr. McGowan: Which leg?

A. Left.

Q. At any time before the patient, Mr. Inman, was discharged from the hospital in April, was he up and around?

A. Yes, on crutches.

Q. Before he was discharged what period of time was he up and around?

A. I believe I read that. May 10th the patient was instructed to use crutches with light weight-bearing.

Q. Now when he left the hospital what was his condition as to walking?

A. He was walking with crutches; his wounds were healed; and he had a brace on his right leg.

Q. And did you continue to examine him thereafter?

[fol. 216] A. I did.

Q. And do your records show what his condition was at the latter part of the year of 1952?

A. Yes I think so.

Q. I have something here to indicate that he was examined by you on the 19th of December, 1952. Can you find a copy of any record or letter on that subject? (Indicating.)

A. Yes I have.

Q. What did your examination disclose at that time?

A. The leg showed practically no difference in the development of the muscular tone at that time; the scars were almost imperceptible; a re-check X-ray of the entire leg on the left showing the tibia and fibula, and also of the right knee, showed solidly healed bones at the fracture site of all three bones.

Q. And did you at that time have an opinion as to whether or not the Plaintiff, Mr. Inman, had recovered from his injuries? You can answer that yes or no.

A. No.

Q. And did you have an opinion at that time as to his injuries having healed?

A. His injuries, his fractures had healed at that time, and I felt that at that time he needed no further medical care.

Q. And why did you feel he needed no further medical care?

A. Because I felt that his injuries which he sustained were well enough healed that he should not require any [fol. 217] more medical care.

Q. And what was his condition at that time with reference to his ability to work and be around?

A. He was walking but using his crutches.

Q. And by the way, did the Plaintiff make any statement, any statement to you as to the distance he was walking at that time?

A. At that time he told me he had walked as much as seven or eight miles.

Q. A day?

A. A day.

Q. Now have you examined him since?

A. I have.

Q. How frequently have you examined him since?

A. I did not examine him between December 19, 1952, until September 10, 1956.

Q. That is just this week?

A. Yes.

Q. When you examined him at my request?

A. That's correct.

Q. What did that examination disclose?

A. That the patient was disrobed for examination, the

measurement of his legs were as follows: The thighs about six inches above the knee were the same size. The left calf is three quarters of an inch less in circumference than the right. The overall length of the left leg is one-half inch shorter than the right.

Q. Now what is the significance, if any, of the difference in the size of the left calf and the right calf?

A. That is due to atrophy of muscles because of the [fol. 218] immobilization for the treatment of the fractures.

Q. Have you an opinion as to the comparative strength in the left leg?

A. The left leg is slightly weaker in the calf muscles than the right, when it comes to putting an exact percentage, that's very, very difficult to do.

Q. I didn't hear you.

A. I say, the exact percentage of the difference in strength of the two legs is very difficult to determine.

Q. Are you able to express an opinion as to whether that would interfere with the normal use of his left leg?

A. I do not think so.

Q. Did you take X-ray pictures on the 10th?

A. I did.

Q. Of what part of the body?

A. The left tibia and fibula and the right knee.

Q. Now what did the left fibula and tibia disclose?

A. They show a completely solid union at the fracture site in the tibia with no evidence of the fracture line being present; the fibula is well-healed, there is a small defect in the center of the bone which is of no importance.

Q. And if you recall, how does that compare with the last X-rays taken which you had seen before 1956?

A. The X-rays which I had seen before still showed the healing but still showed the fracture line. If I may explain that, a fracture can be well-healed but you can still see the [fol. 219] little line where the fracture was, for many months after the fracture.

Q. Now an X-ray, Doctor, is a matter of showing shadows or densities, is it not?

A. That's right.

Q. What did that little line, fracture line, mean, when you saw it?

A. It meant the bone had not completely united across the line where the fracture was. Bone heals somewhat similar to what an electrician does when he welds a piece of steel, he takes two pieces of steel and puts them together and he welds a collar, steel, around that and that's the way bone heals, first a collar of bone heals around the fracture, clear around the bone, then the bone grows directly across the fracture line, and in children the outer ring completely disappears after a period of time. In an adult that ring always shows.

Q. Now at the time these pictures were taken prior to your having seen him in December of 1952, was there a good bit of union even though the fracture behind still showed?

A. That's right.

Q. You say that line was completely obliterated at the time these last pictures were taken, Monday of this week?

A. That's right.

Q. Based upon—I think you Doctors speak of objective symptoms and subjective symptoms?

A. Yes sir.

Q. What do you mean by an objective symptom?

A. Something we can see or feel ourselves.

[fol. 220] Q. And a subjective symptom is what?

A. A symptom that the patient tells us he has.

Q. Based upon your knowledge of this Plaintiff at the time you first treated him at City Hospital, and your examination since, including the examination of September 10th, 1956, I'll ask you whether or not you have an opinion, objectively, as to whether he has recovered from his injuries? You can answer that yes or no.

A. Yes.

Q. And what is that opinion?

A. That he has completely recovered.

Mr. Roetzel: I think you may cross examine.

Cross examination.

By Mr. McGowan:

Q. When you first saw Mr. Inman he was in St. Thomas Hospital, is that right?

A. Right.

Q. You saw him in consultation with Dr. Musser?

A. That's right.

Q. Also a Baltimore and Ohio Doctor?

A. That's right.

Q. Then on your recommendation Mr. Inman was removed to the City Hospital?

A. He was removed to the City Hospital.

Q. All right. You treated him, he was under your care and treatment over there?

A. He was.

Q. You were the attending surgeon?

[Vol. 221] A. That's correct.

Q. Now X-rays were taken when he got over to the City Hospital?

A. I believe so.

Q. And you found a fracture of the left tibia and fibula?

A. That's right.

Q. And the tibia is the bone in the front of the leg, is that right?

A. That's the most prominent bone.

Q. And the fibula is the bone right behind the tibia on the leg, is that right?

A. To the side.

Q. I think you said that the fibula was broken in several small pieces?

A. At the place where it was broken there were several small pieces.

Q. And the right knee was fractured right at the head of the tibia?

A. That's right.

Q. Right in the knee joint?

A. Into the knee joint.

Q. Now when you first saw him over there, what did you do for him?

A. At City Hospital?

Q. Yes.

A. As I have already testified his right leg was put in traction and a brace ordered.

Q. When you say "put in traction," tell us what that consists of, and the purpose of it?

A. Traction for a fracture is either applied with putting adhesive on the skin, strap down the side across the foot and running up the other side, a rope attached to that, attached to an apparatus over the bed, and a weight put [fol. 222] on it. That's to hold your bone fragments in position and in some cases reduce your fracture by this method, and relieve the patient's pain.

Q. Which leg was placed in traction?

A. Right.

Q. That's the one the fracture was in the knee joint?

A. Right.

Q. Are you able to tell us how long that remained in traction?

A. I can't tell you the exact number of days.

Q. What did you do for the left leg at that time?

A. As I have also testified, that was an open reduction.

Q. And can you by looking at the hospital chart tell us when that first open reduction was performed? (Handing chart to witness.)

A. January 17, 1952.

Q. Now that was an operation?

A. That's right.

Q. And the patient was placed under anesthesia?

A. He was.

Q. Now will you tell us what was done in that operation, how that operation was performed?

A. As I told you a while ago, the fracture was immobilized, fixed with a metal pin down through the center of the bone, that's done by first making an incision or, as you would say, a cut through the skin in the soft tissues directly opposite the fracture site where the bone is broken. That's so we can see the ends of the bone and bring them together under direct vision. In this case another incision or cut was then made on the lateral side of the leg just [fol. 223] below the knee, down to the bone, a hole was drilled into the bone at that point and then this curved nail was driven through that hole down through the center of the bone to where we could see it through our first cut and then down into the lower part of the bone.

Q. Now, Doctor, there has been admitted into evidence Plaintiff's Exhibit 24 which is an X-ray of Carl Inman

taken at City Hospital on May 8, 1952, and I wonder if you could designate on that picture where the pin is located? (Handing Exhibit to witness.)

A. This white line running down here, with a little hook on top of it.

Q. Where did that incision you made in the bone start, was it the full length of the pin?

A. No, the drill hole was made here at the top. (Indicating.)

The Court: Can you all see?

(No response.)

Q. How is the pin inserted?

A. Driven in.

Q. At the top?

A. From the top.

Q. And the bottom part is not driven in?

A. It's driven all the way.

Q. Right into the bone?

A. In the middle of the bone.

Q. What is the width of that nail or pin?

A. Different sizes. I forget the exact size of this. Probably three-sixteenths of an inch.

Q. Now I'll hand you what has been marked for identification purposes Plaintiff's Exhibit 23 and ask you does that show the same pin from a different angle? (Handing Exhibit to witness.)

A. It does.

Q. Does that also show the fracture there, Doctor?

A. It does.

Q. I wonder if you could mark with a red pencil the site of that fracture?

A. (Witness marks on Exhibit.)

Q. That is the fracture of what bone?

A. Tibia.

Q. And Plaintiff's Exhibit 24, can you see the site of the fracture on that Exhibit, Doctor? (Handing Exhibit to witness.) Will you mark on there the site of that fracture?

A. (Witness marks on Exhibit.)

Q. Does that show the fracture of the tibia there?

A. Yes.

Q. The fracture of the fibula, will you mark that?

A. (Witness marks on Exhibit.)

Q. Now on Plaintiff's Exhibit 22, which is a picture, a positive of an X-ray, I guess. I'll ask you to look at that and see if that photograph also shows the fracture of the tibia and the fibula? (Handing Exhibit to witness.)

A. It does.

Q. And the pin that has been inserted following your [fol. 225] operation?

A. Yes.

Q. Now, Doctor, what date was that operation performed?

A. January 17, 1952.

Q. And then what was done, was there another operation following that? I notice in the hospital chart there are two?

A. February 12th, "Plaster cast was removed. Stitches were removed. A new plaster cast was applied. A brace was fitted to the right leg."

Q. I notice over here, I don't know if this has any significance, "Permission for Anesthesia and Operation was granted March 15, 1952." Does that have any significance?

Mr. Roetzel: It's obliterated. The other one is over the top of it.

A. March 15th the patient had another change of cast.

Q. Which of his—left leg?

A. Left leg.

Q. Was his right leg placed in a cast, Doctor?

A. No sir.

Q. This cast on the left leg was made out of what material?

A. Plaster cast.

Q. Where did it extend from, start and end?

A. From the toes to the groin.

Q. And the fracture of the right tibia then was not treated by cast, no cast applied?

A. No.

Q. Now, Doctor, Mr. Roetzel asked you about subjective symptoms and objective symptoms. When fractures of

[fol. 226] this type are demonstrated by X-ray that is an objective symptom, isn't it?

A. Yes sir.

Q. In addition to that, I imagine there was some swelling in connection with both of these legs when you saw them?

A. That's right.

Q. What surrounds the fibula and tibia, what is that called that surrounds it, the membrane that surrounds it?

A. Medically, periosteum.

Q. What happened to the periosteum when the fracture occurred in this case?

A. It's usually torn.

Q. In your opinion, was the periosteum torn in this case?

A. Yes sir.

Q. In both the tibia and fibula?

A. Yes sir.

Q. And immediately next to the periosteum what do you find?

A. Muscles, ligaments, tendons, nerves, connective tissue

Q. Blood vessels?

A. Blood vessels.

Q. When you have a fracture of this type what happens to those surrounding ligaments, tendons, muscles, and blood vessels?

A. A certain number of the blood vessels are always torn, they may or may not have tearing or rupture of the other soft tissues. The entire surrounding area is infiltrated with this blood and it seeps out from the broken blood vessels.

Q. What about the nerves, nerves connected to it, nerve [fol. 227] endings in this part of the leg?

A. Sure.

Q. Are nerves affected, nerves that surround the area of this fracture, are they affected in a fracture of this kind?

A. Now when you speak of nerves, are you referring to the nerves as we speak of the perineurium and the tibial nerve?

Q. The nerves that were there—I don't know enough about it—any nerves affected by reason of that fracture?

A. Certainly, whenever you have pain that means irritation of the nerve.

Q. How are those nerves affected in this case, referring to the left leg, at the site of the fracture?

A. How are they affected?

Q. Yes, what happened to them, in your opinion?

A. The only nerve—there are no major nerve injuries—I'm not quite sure what you're driving at—the large nerves that go down the leg were not involved in this injury. The little nerves which go to all tissues, skin, bone and blood vessels are affected from the pressure of the hemorrhage.

Q. How are they affected?

A. Simply stimulated.

Q. Were any of the nerve endings torn?

A. I have no way of knowing.

Q. In your opinion?

A. I don't know what exactly happens physiologically to those nerves.

Q. Were any ligaments torn near the site of this fracture, in your opinion?

A. None of the large ligaments.

Q. Were any ligaments torn?

A. Not to my knowledge.

Q. In your opinion, were any torn?

Mr. Roetzel: Object, he said not to his knowledge.

The Court: Sustained.

Q. When these blood vessels rupture the blood exudes out into the leg, does it not?

A. That's right.

Q. We all know blood is a perfectly wholesome commodity when in its proper channels but when in wrong channels it's not very healthy.

A. That's a wrong statement, it's just as healthy outside as inside.

Q. How does it affect the tissues when it gets out in the vessels?

A. Nature starts to heal that fracture with that blood, that's distributed around the fracture site within a matter of hours from the time the injury occurs.

Q. All right. Did that happen in this case?

A. It did.

Q. What about the muscles, was there any tearing of the muscles within that site?

A. Probably some minor tears.

Q. What do you base that on?

A. Any fracture, the muscles are lying directly over the fracture site they're apt to be torn and we see them with open reduction, we see those tears.

[fol. 229] Q. When these muscles heal how do they heal, with scar tissue?

A. All healing is by scar tissue.

Q. And so if there was tearing of the muscles at the site of the fracture of this leg, it was healed with scar tissue?

A. That's right.

Q. You have little nerves connected to your muscles, do you not, the muscles of your legs?

A. That's right.

Q. When your muscles have scar tissue after they have been torn, when your leg moves, and those muscles move, and this scar tissue rubs against some of those nerves, rubs against scar tissue, you have pain, do you not?

A. No, scar tissue is tissue that binds all the rest of the tissue in the body together.

Q. Now you put this cast on, and that cast was removed the first week in May?

A. I forget the exact date.

Q. And then it was replaced by another cast?

A. That's right.

Q. That cast was taken off the 10th day of May?

A. I believe that's correct.

Q. With reference to the right leg, this fracture was right at the top of the tibia, is that correct?

A. That's correct.

Q. Now I'll hand you what has been marked for identification purposes as Plaintiff's Exhibit 26, and ask you [fol. 230] to look at that and tell the jury, if you can, whether or not that picture shows that fracture of the tibia that Carl Inman sustained? (Handing Exhibit to witness.)

A. It does not.

Q. I'll ask you to look through these Exhibits and see if you can find one that does show it? (Handing Exhibits to witness.)

A. These do. (Indicating.)

Q. All of them?

A. Yes.

Q. Doctor, now referring to Plaintiff's Exhibit 30, will you mark with your pencil where the fracture is shown?

A. This, you would be able—I wouldn't identify this as a fracture only—that's a lateral view. This one shows the fracture line right through here. (Indicating.)

Mr. Roetzel: What's the number?

A. Plaintiff's Exhibit 32. And this copy is so poor that I wouldn't identify that, the fracture is right through that. (Indicating.)

Q. Plaintiff's Exhibit 31?

A. This one shows it right here. (Indicating.)

Q. Are you referring to Plaintiff's Exhibit 20?

A. Yes.

Q. Now, Doctor, that's the head of the tibia there, is it? (Indicating.)

A. The top of the tibia.

Q. And that area in here, what is that? (Indicating.)

A. Joint space.

Q. How are these joints—what is immediately on top [fol. 231] of the tibia, what kind of a membrane?

A. Cartilage, articular cartilage.

Q. What is the synovial membrane?

A. Lining of the joint.

Q. Now when you had a fracture of this kind was the synovial membrane affected in any way?

A. Not necessarily.

Q. You don't think it was in this case?

A. No.

Q. How about the cartilage?

A. It was injured.

Q. How was it injured?

A. Fractured.

Q. When a cartilage is fractured, does that also heal with scar tissue?

A. It does.

Q. Now you prescribed the brace which is an Exhibit there? (Indicating.)

A. I prescribed a brace.

Q. For his right leg?

A. That's right.

Q. What is the purpose of that brace, Doctor?

A. To take the place, for the same purpose as the plaster cast on the left leg.

Q. Do you know how long he continued to wear that brace?

A. Offhand, I do not.

Q. Now I think you said you saw Mr. Inman at your office in December of 1952?

A. That's right.

Q. And did I understand that at that time the fracture lines were still apparent on the X-rays you took?

A. They probably were, usually they are at that length of time.

Q. Did Mr. Inman suffer any atrophy of the muscles [fol. 232] of his left leg?

A. Yes, I have testified to that.

Q. And where was that atrophy located?

A. The calf of the leg.

Q. By "atrophy" you mean wasting away?

A. That's right.

Q. And when you examined him in your office Monday night did you find an atrophy in his left leg?

A. I did.

Q. Was there any atrophy in his right leg?

A. Atrophy is relative, I said his left leg was three-quarters of an inch less than his right one, that is comparatively.

Q. In your opinion, did Mr. Inman suffer any pain from these injuries?

A. You mean at the time of his injuries?

Q. Yes.

A. Certainly.

Q. He testified here Monday, that at times during the change of weather he still has trouble in his left leg. What do you say about that? Is there any connection between

this injury, he says he has pain at times when the weather changes, is that unusual for a man to suffer pain on change of weather when he has a fracture of that kind?

A. Not at all.

Q. What is that due to?

A. Well as all of us know, people have arthritis, or injuries, tell you when the weather is going to change and most of us have laughed at them and said "it's old wives tales." In our opinion, at the present time that is not old wives tales, it's a true condition, the answer is our body, as you know, stays at a normal temperature, even tempera- [fol. 233] ture rather, of about 98 and 6 tenths degrees, although the temperature outside may be from zero to a hundred. We have a mechanism that keeps our internal temperature at that constant level, but we are not conscious of the fact that this is changing, the blood vessels are contracting or dilating with the weather, but as we grow older or following an injury then in that local area where the injury has occurred it does not change rapidly enough, and therefore we are conscious of that change in temperatures, and all of us have that as we grow older.

Q. A person that has an injury to his body, such as Mr. Inman had, that wouldn't be unusual for him to feel pain in that area when the temperature changes, would it?

A. Not at all.

Q. Are you able to give the jury an opinion as to whether that condition is temporary or whether it will be permanent?

A. It may be permanent.

Mr. Roetzel: Object to the question in that form.

Mr. McGowan: Withdraw the question.

Q. Based upon reasonable medical certainty, Doctor, in your opinion, will the pain which Mr. Inman complains about in his left leg upon changes of weather be a permanent condition or is it a temporary condition?

Mr. Roetzel: Still object.

The Court: Overruled.

[fol. 234] Mr. Roetzel: He still hasn't gone far enough.

The Court: Overruled.

A. The question cannot be answered by "yes" or "No." People vary a great deal by the length of time that follows an injury.

Q. In other words, you don't know whether that condition will get better or remain the same or get worse?

Mr. Roetzel: Object.

The Court: Yes.

Q. With reasonable medical certainty, you are not able to say whether that condition he complains of will remain the same or get better or get worse?

Mr. Roetzel: I object.

The Court: Overruled.

Mr. Roetzel: Your Honor, that was not the question put to the Plaintiff.

The Court: I thought you followed along the same rule:

Mr. Roetzel: When Your Honor checks the record you will find he did not.

Mr. McGowan: It's cross examination—I'll withdraw it.

Q. Based upon reasonable medical certainty, are you able to tell this jury whether or not Mr. Inman's condition that he complains about in his left leg, that is the pain on the change of weather, will get better in the future or remain the same or get worse?

A. In my opinion it probably will get better; it may remain the same; I do not believe it will get worse.

Q. That leg of course—the pin is still in the leg?

A. Yes.

Q. That will remain there the rest of his life?

A. Not necessarily.

Q. You haven't recommended it be removed?

A. Not yet.

Q. You wouldn't recommend that pin be removed at this time?

A. Not until it gives trouble, if and when.

Q. When might that give him some trouble?

Mr. Roetzel: Object.

Mr. McGowan: I'll withdraw that question.

Q. Will you explain that answer to the jury, "when it gives him some trouble"?

The Court: "If and when."

A. As we all know, our tissues, bones, muscles, and ligaments, are living tissues, we use now a great deal of substitute tissues in our bodies, and this happens to be one of them; any tissue, any material besides our own tissue is foreign material, and many times it will remain in place for the length of the patient's life, and will produce no disturbance whatever. Occasionally there will be an absorption of the tissues directly around this foreign material, and [fol. 236] if and when that time occurs then these foreign materials should be removed.

Q. How do you go about removing them?

A. Just the same as we put them in.

Q. He'd have to go to the hospital, would he, to have that done?

A. Yes.

Q. Have an operation, anesthesia?

A. That's right.

Q. You'd make an incision in his leg?

A. That's right.

Q. How would that pin be taken out?

A. With a pair of pliers.

Q. Would it be replaced by another pin?

A. No.

Mr. McGowan: I think that's all.

Redirect examination.

By Mr. Roetzel:

Q. Doctor, based upon your observations of the Plaintiff, and the physical examinations, concerning which you have testified, have you an opinion as to whether it is probable that Mr. Innan will have to have that pin removed?

A. I would say everything considered, he probably will not.

Q. By the way, were you subpoenaed here by the Plaintiff as a witness?

A. I was subpoenaed by Mr. McGowan twice, this was the second time.

Q. And you were not used as a witness?

A. That's correct.

[fol. 237]

Recross examination.

By Mr. McGowan:

Q. You were subpoenaed last spring and the case was continued?

A. That's right.

Q. And you were subpoenaed this time, for Tuesday, were you not?

A. 1:00 o'clock.

Q. I told you I'd call you when I needed you?

A. That's right.

Q. In the meantime Mr. Roetzel—

Mr. Roetzel: Object.

The Court: Put the question.

Q. In the meantime Mr. Roetzel had called you and arranged for an examination of Mr. Inman by you for Monday night?

A. Mr. Roetzel arranged for an examination, at what time I can't remember.

Q. Mr. Roetzel told me he was going to put you on the stand.

Mr. Roetzel: I did not. I asked the Court for the privilege of having him examined by Dr. Roberts. I said as long as Dr. Roberts treated him it might as well be him.

By Mr. McGowan:

Q. You are still the doctor for the B & O?

A. No, I am not the doctor for the B & O. I do a lot of work for the Baltimore and Ohio.

Q. Yes. You do a lot of work for the Baltimore and Ohio?

A. Yes. I do a lot of work for other people, too. I'm [fol. 238] not on salary for the Baltimore & Ohio.

Mr. Roetzel: I don't have any other witness. One thing I overlooked, I'd like to ask Dr. Roberts to demonstrate that picture, I forgot it.

The Court: All right.

Redirect examination.

By Mr. Roetzel:

Q. I asked you about an X-ray you took, but I neglected to ask you to produce it. Do you have it with you.

A. (Witness hands X-ray to Mr. Roetzel.)

Mr. Roetzel: Mark this Defendant's Exhibit D-D.

(Defendant's Exhibit D-D marked, X-ray.)

Q. Tell us what this Defendant's Exhibit is, D-D?

A. This is an X-ray made in our office by our X-ray Technician, at the same time the patient was examined.

Q. On the 10th of September?

A. Yes.

Q. Who is the Technician?

A. Mr. Ebner.

Q. What experience has that technician had in taking X-rays?

A. He's had long experience, he's not a doctor, but has had a lot of experience.

Q. These pictures taken at the hospital are all taken by technician?

A. That's right.

Q. That's common practice in the medical profession in Akron, and has been for a number of years?

A. Yes.

Q. What do you say as to whether or not the Exhibit correctly portrays the condition of the bony structure [fol. 239] of the Plaintiff as it actually exists?

A. It shows the exact condition of the bone at the present time.

Q. Now I wish you'd put that in this viewing box and show the jury what it does show? (Indicating.)

A. (Witness does so.)

The Court: Are you all able to see?

A. This view on this side shows a view of the tibia, this big bone; and the fibula, the smaller one, from front to back. This one is the same picture except it's taken from the side, the view is from the side. What you see here is the metal nail you have been shown in these other pictures, on both sides. This center of the bone here is what we spoke of as the medullary canal, and this is the thick border of the bone. In other words, this bone in this region here, from here to here, is a cylinder, a very dense hard bone with fat and blood vessels in between here. These ends here are not dense bone but has a little thin border here and all the center of this bone here at this end and this end is made up of a honeycomb, like a honeycomb, as I also told you where the fracture site is. The only way you can tell here is by this bulge of bone, ring of bone, which is still present, and will be present as long as he lives, and produces no symptoms whatever. This bone is completely solid; the hard dense bone here is completely re-established in the canal, is re-established in the center showing on both the AP and the lateral views here. (Indicating.)

[fol. 240] Q. How does that picture of the leg, as you look at it there, compare with it actually?

A. That depends on the distance, how far the tube is from the leg, and the distance, the thickness of the leg on the X-ray film, it's different in a large—

Q. I mean as to length?

A. This is longer.

Q. It is longer than it actually is?

A. That's right.

Q. When you were asked about driving this nail through the bone, the place where it was driven through, is there actually bone in that part?

A. No, that's a canal there, this is soft bone like a honeycomb here, in here and here, this is a canal filled up with fat and blood vessels. (Indicating.) You remember we drilled a hole at this point and this end here was put in that hole, driven in here with a hammer until we see it at this point, then when the fracture is reduced and in place this is driven in here. (Indicating.)

Q. In other words, the honeycomb bone ends up here some place and starts down here again, in between is just a canal, it has no bone in it? (Indicating.)

Recross examination.

By Mr. McGowan:

Q. This nail does extend just below the top of the tibia?

A. Yes.

Q. Right almost to the angle?

A. That's right.

Q. And, Doctor, in your opinion, will this fracture over [fol. 241] here, of the fibula, ever completely heal?

A. No, it doesn't matter whether it ever heals. This bone has no function from here up to here, except to make your ankle joint. (Indicating.)

Mr. McGowan: That's all.

Mr. Roetzel: That's all. I'm sorry I had to call you back (Witness excused.)

* * * * *

The Court: Call your next witness.

Thereupon in order to further maintain the issues on its part, the Defendant called as its next witness D. T. KINGSLEY who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Roetzel:

Q. You may state your name, please?

[fol. 242] A. D. T. Kingsley.

Q. How old are you?

A. 55.

Q. Where do you live?

A. On Route 8.

Q. Are you single or married?

A. Married.

Q. What is your occupation?

A. Surveyor.

Q. Are you licensed?

A. Yes sir.

Q. How long have you been a licensed surveyor?

A. 25 years.

Q. Did you operate under the name of Gehres & Kingsley?

A. Yes.

Q. Gehres is deceased?

A. That's right.

Q. In those 25 years have you done a substantial amount of surveying?

A. I think so.

Q. Does that include the fixing or determining of a point at which a straight line would cross a fixed object?

A. Yes sir.

Q. Did you at my request go to the Tallmadge Avenue crossing and station yourself at a point in the center line of Tallmadge Avenue west of the B & O tracks and determine the point at which the line of vision of one stationed three feet west of the west rail of the westbound Baltimore & Ohio track, standing in the middle line of Tallmadge Avenue, the point of line of vision of a person would cross the west rail of the eastbound main track if he were looking at the signal called the approach signal, down toward Evans Avenue?

[Vol. 243] A. Yes sir.

Q. Did you do that?

A. I did.

Q. How did you do it, what method did you use?

A. The transit was set up in the center of Tallmadge Avenue at a point five feet above the pavement, so that the telescope was at this five foot level above the pavement, and then sighted it toward the signal.

Q. Directed toward the signal?

A. That's right.

Q. Would that be on the same direct line of vision, line as one would see it with the human eye?

A. The same thing.

Q. At what point would that line from the eye looking toward that signal, directly at the signal, cross the west rail of the eastbound main track of the B & O?

A. 134 feet southerly from the center line of Tallmadge Avenue.

Mr. Roetzel: Cross examination.

Mr. McGowan: No cross examination.

Mr. Roetzel: That's all the oral testimony the defense has to offer.

The Court: You are resting?

Mr. Roetzel: I think I have offered all my Exhibits except possibly—

The Court: The map?

Mr. Roetzel: The Mutual Exhibit goes in by agreement. [fol. 244] The Court: Do you have anything else?

Mr. Roetzel: I don't know if I offered the X-ray Dr. Roberts testified about. I offer it now.

The Court: May be admitted.

Mr. Roetzel: I think all the other Exhibits have been offered. With that the Defendant Rests.

Mr. McGowan: Are we going ahead any more?

The Court: I'd like to finish the testimony this afternoon.

Mr. McGowan: There are just one or two questions I'd like to ask Mr. Inman.

The Court: Mr. Inman, take the stand.

Thereupon in order to further maintain the issues on his part, the Plaintiff again took the stand.

CARL C. INMAN who, being previously sworn, testified as follows:

Redirect examination.

By Mr. McGowan:

Q. Carl, before you were struck, did you give any motion or any signal to traffic going in either direction on Tallmadge Avenue, to proceed over the crossing?

Mr. Roetzel: I object. He's already testified to what he did.

The Court: He may answer.

Q. Did you or didn't you?

A. I did not signal anyone because I—

[fol. 245] Mr. Roetzel: Wait. Read the question.

The Court: Sustained.

Q. Had the caboose crossed fully over the crossing before you signalled?

Mr. Roetzel: I object.

The Court: I thought he had— Yes, just a reiteration of your direct testimony.

Mr. McGowan: All right. If the Court feels he's testified to that. That's all.

The Court: Anything else? Do you have all your Exhibits in now?

Mr. McGowan: I think I have. I offered those two pictures this morning, two Exhibits.

Mr. Roetzel: As far as I know, they're in.

* * * * *

[fol. 246]

OVERRULING OF MOTIONS

Mr. Roetzel: The Court has not ruled upon my motions?

The Court: I'm going to overrule your motion for the striking of the third specification of negligence as well as overruling the motion for a directed verdict.

Mr. Roetzel: You mean the motion made at the close of Plaintiff's evidence?

The Court: That's right.

Mr. Roetzel: Did you say the third specification of negligence?

The Court: I'm overruling your motion made to strike that; also the motion made at the close of Plaintiff's case.

Mr. Roetzel: At this time the Defendant moves the Court to withdraw this proceeding from the consideration of the Jury and render a judgment for the Defendant.

The Court: Overruled.

Mr. Roetzel: An alternative, Defendant moves the Court to direct the jury to return a verdict for the Defendant.

The Court: Overruled.

Mr. Roetzel: At this time at the close of all the evidence the Defendant renews its motion to strike the third and

unnumbered specification of negligence which was the same one to which our motion was addressed to wit: Defendant negligently and carelessly failed to place another employee at said crossing to watch for other trains approaching said crossing while Plaintiff was on flagging duty, to the end that the Plaintiff could keep a lookout and watch for traffic proceeding from Home Avenue into said intersection, particularly the vehicle that struck Plaintiff as aforesaid. I'd like to argue that matter at this time.

[fol. 247] The Court: All right.

(Counsel argue.)

The Court: Let the record show I have overruled this last motion for a directed verdict; Motion overruled also.

Mr. Roetzel: To which we object.

[fol. 248]

DISCUSSION RE INSTRUCTIONS SUBMITTED TO THE COURT

(Discussion off the record.)

The Court: I'm going to refuse Number 1.

Mr. Roetzel: Let the record show the Court having indicated his intention to refuse Defendant's Request Number 1 before argument, now requests the Court to charge the jury in the general charge by including Request for Special Instructions Number 1 as written, or if the Court refuses to so charge then charge the jury correctly upon each of the subject matters included in Instruction Number 1.

The Court: I'll do that to the best of my ability. I'll [fol. 249] give Number 2. I'll give Number 3. What about Number 4?

(Discussion off the record.)

The Court: I'll refuse Number 4.

Mr. Roetzel: Let the record show the Defendant requests the Court to include Special Instruction Number 4 in its general charge to the jury or if the Court refuses

to so charge then to correctly charge the jury upon the subject matters, each of the subject matters, included in Instruction Number 4.

The Court: The same is true of Number 5. I'll refuse that.

Mr. Roetzel: Let the record show the Defendant makes a similar request with reference to Instruction Number 5 as was just made with reference to Instruction Number 4.

The Court: I'll refuse Number 6 on the same ground.

Mr. Roetzel: Let the record show the Defendant makes the same request with reference to Instruction Number 6 as was made with reference to Instruction Number 4.

The Court: Refuse Number 7 on the same ground.

Mr. Roetzel: Let the record show the Defendant makes the same request with reference to Instruction Number 4.

The Court: I'll refuse Number 8 on the same ground.

Mr. Roetzel: Let the record show the Defendant with reference to Instruction Number 8 makes the same request as was made with reference to Instruction Number 4.

The Court: Let the record show insofar as Requests for Special Instructions before argument by the Defendant, the Court is refusing 1, 4, 5, 6, 7, and 8, to all of which [fol. 250] the Defendant objects; and I am giving 2 and 3.

Mr. McGowan: Let the record show an objection on the part of the Plaintiff to the giving of Special Instruction Number 3.

(Proffer)

I

You are instructed that in arriving at a verdict you are permitted to consider only the evidence, the admissions made in the pleadings, and the admission and stipulations of counsel. You must base your verdict solely and entirely upon such evidence, admissions and stipulations, and the law applicable to this case as it is given to you by the Court. Arguments of counsel are not evidence, and are permitted only for the purpose of aiding you in interpreting and weighing the evidence. The pleadings are not evidence and must not be so regarded, but they are merely statements of the claims of the respective parties. In arriving at your verdict, you must not permit yourselves

to be influenced by sympathy or prejudice. In determining whether the Plaintiff is or is not entitled to recover, you must not consider, and it is your sworn duty to disregard the nature and extent of the injuries of the Plaintiff and the fact that the Defendant is a corporation. It is likewise [fol. 251] your duty to disregard any considerations, facts or conclusions except such as are based upon the evidence and admissions and stipulations of counsel, and the law as given you by the Court.

(Which request the Court refused to give to the Jury, and to which refusal the said Defendant then and there excepted.)

(Proffer)

IV

The Court says to you that the law of Ohio provided that no vehicle shall be driven to the left of the center or center line of a highway approaching within 100 feet of or in traversing any street intersection or railroad crossing unless compliance is impossible because of insufficient roadway space. The Court further says to you that under the undisputed evidence of this case the operator of the motor vehicle which came into collision with Plaintiff violated this requirement of law and that Defendant in the exercise of ordinary care to provide Plaintiff a reasonably safe place to work, was not required to anticipate or foresee such violation.

(Which request the Court refused to give to the Jury, and to which refusal the Defendant then and there excepted.)

[fol. 252] (Proffer)

V

The Court says to you that the law of Ohio provided that at any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, the approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to

leave the intersection to the right of the center line of the roadway being entered, and that wherever practicable, the left turn shall be made in that portion of the intersection to the left of the center of the intersection. The Court says to you that under the undisputed evidence of this case, the operator of the motor vehicle which came into collision with Plaintiff, violated this law and the Court further says to you that Defendant, in the exercise of ordinary care to provide Plaintiff a reasonably safe place to work, was not required to anticipate or foresee such violation.

(Which request the Court refused to give to the Jury, and to which refusal the said Defendant then and there excepted.)

[fol. 253] (Proffer)

VI

The Court says to you that the law of Ohio provides that no person shall turn a vehicle from a direct course upon a highway unless and until such person shall have exercised due care to ascertain that such movement can be made with reasonable safety to other users of a highway and then only after giving a clear audible signal by sounding a horn if any pedestrian may be affected by such movement or after giving any appropriate signal in the event any traffic may be affected by such movement, and a signal of intention to turn left shall be given in sufficient time in advance of the movement indicated to give ample warning to other users of the highway who would be affected by such movement. The Court says to you that under the undisputed evidence of this case the operator of the motor vehicle which came into collision with Plaintiff violated these provisions of the law and the Court further says to you that Defendant, in the exercise of ordinary care to provide Plaintiff a reasonably safe place to work, was not required to anticipate or foresee such violation.

(Which request the Court refused to give to the Jury, and to which refusal the said Defendant then and there excepted.)

[fol. 254] (Proffer)

VII

The Court says to you that the law of Ohio provides that no person shall operate a motor vehicle without due regard for the safety or rights of pedestrians so as to endanger the life, limb and property of any person while in the lawful use of the streets or highways. The Court says to you that under the undisputed evidence of this case the operator of the motor vehicle which came into collision with Plaintiff violated this law and that Defendant, in the exercise of ordinary care to provide Plaintiff a reasonably safe place to work, was not required to anticipate or foresee such violation.

(Which request the Court refused to give to the Jury, and to which refusal the said Defendant then and there excepted.)

(Proffer)

VIII

The Court says to you that under the undisputed evidence of this case, Tallmadge Avenue was a through highway with a stop sign on the south side thereof at its intersection with Home Avenue, and the law of Ohio made it the duty of operators of motor vehicles on Home Avenue to obey said stop sign before entering upon Tallmadge Avenue, and yield the right of way to all vehicles upon [fol. 255] Tallmadge Avenue, and that under the undisputed evidence of this case the operator of the motor vehicle which came into collision with Plaintiff violated this law. The Court further says to you that Defendant, in the exercise of ordinary care to provide Plaintiff a reasonably safe place to work, was not required to anticipate or foresee that the operator of the motor vehicle which struck the Plaintiff would violate this law.

(Which request the Court refused to give to the Jury, and to which refusal the said Defendant then and there excepted.)

* * * * *

[fol. 256]

OFFERS IN EVIDENCE

Mr. Roetzel: I think Plaintiff's Exhibit 17 was admitted. In order to avoid any conflict I'll ask that 17 and 18 be admitted.

The Court: The Court will allow you to open up your case so that they may be admitted. Do you have anything to exhibit to the jury at this time, Mr. Roetzel?

Mr. Roetzel: Yes.

* * * * *

[fol. 257]

COURT'S CHARGE

Thereupon court adjourned until 1:30 o'clock P. M. on this day, at which time court convened pursuant to adjournment, and said trial proceeded as follows:

Thereupon the Court charged the jury as follows:

Now, Ladies and Gentlemen of the Jury, the Plaintiff in this case is the man that brings the action. That is Carl Inman; and the Defendant is The Baltimore & Ohio Railroad Company. The issues are raised by the Plaintiff's petition and the Defendant's answer. And in order that you might properly decide the issues or the matters that are in dispute it is the duty of the Court to charge you as to the law that governs this particular case so as to guide you throughout your deliberations and you should apply the law as the Court gives it to you and not what you believe the law is nor what it should be. Is that clear to you?

At the outset of this trial counsel for both Plaintiff and Defendant made opening statements and outlined what they believed the evidence received would be; what they expected to prove by that evidence.

Counsel have made closing arguments in which they set forth inferences and conclusions which they believe might be drawn from the evidence.

[fol. 258]—The Court charges you that the opening statements of counsel, their closing argument, were made only for the purpose of enabling the jury, if possible, to better understand the issues. In no sense are you to consider

as evidence the opening statements of counsel, their closing arguments, questions and answers and other matters the Court asks you to disregard. Neither are you to consider the allegations in the pleadings that I will later read to you as evidence. They simply are read to you only that you may be apprised of the matters that are in dispute. Do you understand?

You are the judges of the facts, the sole judges of the facts. You are also the judges of the credibility of the witnesses and the weight of their testimony and in determining these remember the respective witnesses on the stand, how they testified, what interest they had, if any, in the outcome of the lawsuit, their zeal or their reluctance to testify; their intelligence; their demeanor and conduct while on the stand; their memory to remember things about which they had testified; their relationship, if any; their means of acquiring the knowledge of things about which they testified; and any other matters that your human experience tells you to consider as long as you do not go contrary to the Court's charge.

Whenever the testimony is conflicting it is your duty to reconcile, if possible, on the theory that all witnesses are sworn to tell the truth, but if you cannot do so it is your privilege to disregard so much of the testimony as you deem unworthy of credibility.

In the final analysis you have the right to believe or [fol. 259] disbelieve the whole or any part of the witness' testimony since you are the sole judges of the facts.

There has been some effort made to impeach witnesses and whether or not a witness is impeached is for you to determine. A witness may be impeached by proving statements made out of court as being contrary to statements made in court and if you conclude that a witness has been impeached you will consider that fact in weighing his testimony and as going to his credibility.

In your deliberations you will consider the admissions made by the parties either by themselves or by counsel, and the undisputed facts in this case, and the matters which the Court will charge you that you should consider as proved as matters of law, together with the testimony of the witnesses on the stand and the exhibits properly intro-

duced, together with the Special Instructions given you before argument and the law as the Court now gives it to you in his general charge.

The Court has charged you that the degree of proof to be established by the Plaintiff is by a preponderance of the evidence, that is there is a duty or burden upon the Plaintiff to establish all material allegations of his petition by a preponderance of the evidence. Preponderance of the evidence does not necessarily mean that one side has more witnesses than the other. It means you are to weigh the [fol. 260] evidence that inures to the benefit of the Plaintiff as against that which resolves itself to the benefit of the Defendant, and the side which has the greater weight is said to have the preponderance. Preponderance of the evidence is also said to be on the side that has established his or its case by the greater probability of the truth.

Now if after hearing the evidence and weighing the evidence on an imaginary scales you find those scales are evenly balanced and you cannot say the Plaintiff or Defendant Company has the greater weight of the evidence, then in this event it will be necessary for your verdict to be for the Defendant Company because the burden is on the Plaintiff to prove his case by the preponderance or the greater weight of the evidence. Is that clear?

Evidence consists in what the witnesses have been permitted to say to you, inferences you might draw therefrom together with the admissions made by parties or by their counsel, together with the exhibits that have been introduced in evidence.

There has been some evidence, or testimony, rather, offered which is called expert testimony. These witnesses because of their training, knowledge, and experience are permitted to express opinions which ordinary persons are not permitted to express. The testimony of these witnesses should be given such weight as you find it deserves remembering their skill, experience, knowledge, veracity, and [fol. 261] ability to know of the things about which they have testified. If you believe that the Court in his charge is attempting to favor one side over the other or is attempting to indicate his views on the facts in this case I ask you to disregard that conclusion. If you believe dur-

ing the trial of this case that I have been more partial to one side than the other I ask you to disregard that. I am only sitting here giving you the law that I believe is applicable in this case and you are the judges of the facts.

The fact that the Plaintiff is an individual and the Defendant a Railroad Company or that the Plaintiff suffered injuries or that the Plaintiff has sued the Defendant Company or that I will later charge you on the questions of damages should not because of those facts alone cause you to believe that I think that the verdict should be for or against the Plaintiff. That is your duty. It would be a violation of your oath as jurors to allow sentiment or sympathy to enter into the formation of your verdict for you have taken an oath to render a true and correct verdict according to the law and the evidence, and if you allow sentiment or sympathy to influence you in that you will be denying your oath as jurors.

Now the petition of the Plaintiff is as follows— These first three allegations have been admitted by the Defendant and they are as follows:

Comes now the Plaintiff and avers that the Defendant is and at all times hereinafter mentioned was, a corporation [fol. 262] duly organized and existing under and by virtue of law, owning, maintaining and operating various lines of steam railroad in the State of Ohio and elsewhere throughout the United States, one of which lines extends into and through the City of Akron, Summit County, Ohio.

Plaintiff further avers that at the time hereinafter complained of, both he and the Defendant were engaged in interstate commerce and this action is brought under the Act of April 22, 1908, and the amendments thereto, commonly known as the Federal Employer's Liability Act.

Plaintiff further avers that Tallmadge Avenue is and at all times hereinafter mentioned was, a duly dedicated public street and thoroughfare in the City of Akron, Ohio, extending in a general easterly and westerly direction; that Home Avenue is and at all times hereinafter mentioned was a duly dedicated public street and thoroughfare in the City of Akron, Ohio, extending in a general northeasterly and southwesterly direction, intersecting said Tallmadge Avenue.

Now that much of the petition has been admitted by the Defendant in the Defendant's answer.

Next the "Plaintiff further avers that at the time herein referred to, and for a long time prior thereto, the railroad tracks of the Defendant extended in a diagonal direction, at grade, across said intersection from the north to the southeast corners thereof; that said intersection and [fol. 263] crossing was extensively used by the traveling public at all hours of the day and night; that Defendant operated trains on said tracks and over said crossing at frequent intervals; that said intersection was so constructed that vehicles proceeding in a northeasterly direction on Home Avenue could make a left hand turn onto Tallmadge Avenue, without crossing said railroad tracks, at a point in said intersection immediately west of the railroad tracks of the Defendant."

Now insofar as that particular allegation is concerned, the Defendant says, "For answer to paragraph 4 of the petition, Defendant admits that at all times alleged in the petition the Defendant owned and maintained railroad tracks which extended at grade across the intersection of said Tallmadge Avenue and Home Avenue; that the Defendant operated trains on said tracks and over said crossing; that said crossing was not equipped with gates and was attended by a watchman or flagman."

Next, "Complaining of the Defendant, Plaintiff avers that on or about the 2nd day of January, 1952, at about 12:10 o'clock in the night season, while he was employed as a crossing flagman for the Defendant, it became and was his duty as such flagman to signal and warn the traveling public of the presence of one of Defendant's trains traveling over the tracks of said crossing at said intersection, and in the course of his said duties, he was required to be and was standing on Tallmadge Avenue, at [fol. 264] a point where said street was intersected by Home Avenue, just west of the tracks of the Defendant, when he was suddenly and violently struck by an automobile being driven in a northeasterly direction on Home Avenue and making a left hand turn into Tallmadge Avenue at said intersection, and as a consequence whereof, Plaintiff was seriously injured as hereinafter described.

Now the allegations of paragraph 5, as to those allegations the Defendant says, "For answer to paragraph numbered 5, Defendant admits on information and belief that on or about the 2nd day of January, 1952, at about 12:10 A.M. Plaintiff while on duty as a crossing flagman at the aforesaid crossing was struck by an automobile and sustained some personal injuries.

Following the reading of the Plaintiff's petition the "Plaintiff further avers that said crossing is particularly hazardous to flagmen of the Defendant Company; who are required to be on duty thereon, at the place where Plaintiff was struck by said vehicle, for the reason that during the time trains are passing over said crossing, the flagman is required to keep a lookout for other trains of the Defendant approaching said crossing and while so engaged, it is impossible for the flagman to watch for or observe vehicles entering the intersection of Tallmadge Avenue from Home Avenue at the point where Plaintiff was struck, as aforesaid.

The allegations of this paragraph have been denied by [fol. 263] the Defendant as well as this paragraph:

"Plaintiff further avers that at the time complained of, the Defendant negligently ordered and directed Plaintiff to perform his duties as a flagman at said crossing, when it was impossible for him to observe vehicles entering said intersection from Home Avenue and without taking any measures to prevent him from being struck, as aforesaid; and negligently and carelessly failed to place another employee at said crossing to watch for other trains approaching said crossing, while Plaintiff was on duty flagging, to the end that Plaintiff could keep a lookout and watch for traffic proceeding from Home Avenue into said intersection, and particularly the vehicle that struck Plaintiff as aforesaid."

That allegation has been denied by the Defendant.

Next "Plaintiff further avers that as a direct and proximate result of the negligence of the Defendant, as herein set forth, he was violently struck by said automobile and he sustained numerous bruises and contusions on various parts of his body. He sustained a severe blow to his head, rendering him unconscious. He sustained numerous bruises

on the right side of his face and head. He suffered a fracture of the tibia of his left leg. He suffered a fracture of the fibula of his left leg. He suffered a depressed fracture of the tibial plateau of his right leg. He suffered a severe shock to his nervous system; that as a result of the fracture [fol. 266] of his left leg, it was necessary for him to undergo a major surgical operation for the open reduction of the fractures of the left leg; that his left leg was put into a cast and remained therein, for a period of approximately 131 days; that by reason of the fracture of the right leg, his right leg was placed in traction, and thereafter Plaintiff was required to wear a metal brace on his right leg, for a period of approximately 16 months; that said brace extended from the sole of his shoe to his waist; that following said injuries, Plaintiff was confined in hospitals by reason thereof, for a period of approximately 97 days; that during this time, he was unable to walk; that thereafter, for a period of approximately one year, he needed the aid of crutches in walking; that the fractures to his legs were of such a nature, that he also suffered a severe damage and injury to the surrounding muscles and ligaments; that as a result thereof, the regions about said fractures became badly swollen, discolored and very painful to the touch; that to a lesser degree, this soreness and stiffness has continued to the present time; that up to the present date, the walking of any appreciable distance, causes him considerable discomfort; that he suffers from loss of circulation in his legs; that said injuries caused him excruciating pain and mental anguish and that they are permanent in nature; that by reason of said injuries, Plaintiff has been permanently incapacitated from performing any work or labor, all to his damage in the sum of One Hundred Thousand Dollars (\$100,000).

[fol. 267] Wherefore, Plaintiff prays judgment against the Defendant in the sum of One Hundred Thousand Dollars (\$100,000.00).

The Defendant says: "For answer to paragraph numbered 8, Defendant admits on information and belief that Plaintiff sustained some injuries as a result of being struck by said automobile, but denies that same were of the nature and character alleged in the petition.

Except as hereinbefore admitted or qualified the Defendant denies each and every allegation contained in said petition as amended, and prays that said petition be dismissed."

The allegations of these pleadings, of course, raise the issues in this case and as I have said, issues mean the matters in dispute. This action is brought under and by virtue of the Federal Employer's Liability Act which is as follows, in part. "Every common carrier while engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, provided the injury resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

The Court charges you that the Defendant Company is a common carrier and that, as a matter of admission at the time of the Plaintiff's injury the Defendant Company [fol. 268] was engaged in interstate commerce, and also that at the time of his injury the Plaintiff was employed by such carrier in such interstate commerce.

The issues in this case then are the matters that are here in dispute, and they are negligence, contributory negligence, proximate cause, extent of injury and question of damages.

The Court charges you at the outset of this case that there is a legal presumption that the Defendant Company was not negligent, as well as a presumption that the Plaintiff was not guilty of contributory negligence, and this presumption that the Defendant was free from negligence continues until such a time, if at all, as you find that the Plaintiff has proved the Defendant guilty of negligence as charged by a preponderance or the greater weight of the evidence. The presumption that the Plaintiff is free from contributory negligence continues until such a time, if at all, as the testimony of the Plaintiff raises an inference of contributory negligence which is not dispelled by evidence of at least equal weight or until such a time as you find the Defendant Company has proved the Plaintiff guilty of contributory negligence by a preponderance of the evidence.

The Plaintiff before he can recover at your hands must prove all the material allegations of his petition by a pre-

ponderance of the evidence, and since the Court has charged [fol. 269] you that as a matter of admission the Defendant Company and Plaintiff at the time of the Plaintiff's injury were engaged in interstate commerce you will direct your attention in the first instance to the determination of whether the Defendant Company was guilty of negligence as charged.

The fact that I use the term "guilty" of negligence should not cause you to infer this is a criminal action. It is simply a civil action brought by the Plaintiff against the Defendant Company to attempt to recover damages for his injuries.

Negligence is defined as the want or the lack of ordinary care. It may consist in doing something that should not be done or in not doing something that should be done. In a legal sense it is such an act or omission of duty or violation of law amounting to want of ordinary care which in the natural and ordinary course of events, causes the injury complained of.

By ordinary care in this case is meant that degree of care which persons of ordinary carefulness and prudence operating a railroad are accustomed to use under like or similar circumstances in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others and the objects to be accomplished.

The Court charges you that the Defendant Company is [fol. 270] not an insurer of the safety of its employees, nor is it liable merely because the Plaintiff was injured while in the employ of said company.

The Court charges you that there is a duty on the Defendant Company to use ordinary care to see that the employee is provided with a reasonably safe place to work.

The test of this duty is not whether the place at which the Plaintiff performed his work was absolutely safe, nor whether the Defendant Company knew the place to be unsafe, if it were, but the test is whether or not the Defendant Company exercised ordinary care and diligence to make this place reasonably safe for the Plaintiff to perform his employment with the Defendant Company. The reasonableness of the care to provide such place to work depending upon the danger attending that place of work.

The Plaintiff claims that the Defendant Company failed in this duty in that the Defendant Company through its officers or other employees negligently and carelessly ordered and directed Plaintiff to perform his duties as a flagman at said crossing when it was impossible for him to observe vehicles entering said intersection from Home Avenue and without taking any measures to prevent him from being struck.

The second claim or specification of negligence is "That the Defendant negligently and carelessly failed to place another employee at said crossing to watch for other trains [fol. 271] approaching said crossing while the Plaintiff was on duty flagging to the end that the Plaintiff could keep a lookout and watch for traffic as seen from Home Avenue into said intersection, and particularly the vehicle which struck the Plaintiff.

The Court charges you that the Defendant Company being a corporation acts only through its officers, agents, or employees, and the direction and orders by the employees of the Defendant Company as to the duties of the Plaintiff are considered in this case to be the direction and orders of the Defendant Company, and likewise the acts or failure to act on the part of the employees excepting the Plaintiff are also considered to be the acts of the Defendant Company.

You may consider the physical facts in this case because sometimes the physical facts speak louder than words and then again they are silent.

After an accident has happened it is usually easy to see how it could have been avoided but negligence is not a matter to be judged after an occurrence. It is always a question of what reasonably prudent persons under like or similar circumstances would or should have anticipated in the exercise of ordinary care. Where there is no danger reasonably to be anticipated or apprehended, there is no duty to guard against something that in the minds of reasonable men does not exist. However, if such expectation carries a realization that a given set of circumstances is suggestive of danger, then failure to take appropriate [fol. 272] safety measures constitutes negligence.

In determining the claims of the Plaintiff charging the Defendant Company with failure to use ordinary care you will consider the conditions existing immediately prior to the injuries to this Plaintiff and all the surrounding circumstances as well as the following instructions issued by the Railroad Company and they are in part as follows:

Crossing watchmen will provide themselves through the track foreman with the following flagging equipment and keep it in good order and ready for use and will also provide themselves with a shrill whistle to be used in attracting attention when flagging a crossing at night; 2 red lamps; 1 white lamp; 1 green lamp; 6 or more fuses; 6 or more torpedoes; day and night 1 shrill whistle.

Sec. 133 is as follows in part: Crossing watchman will at all times be in position to observe the approach of engines, trains or track cars and highway traffic. Where there are two or more tracks, the watchman will when practicable, take a position near the opposite track from the one on which the train is approaching where they can best warn highway traffic of a train approaching on the other track. When it is safe for highway traffic to move over the tracks, crossing watchman will signal such traffic to cross, and by night this signal will be given with a green lamp. The watchman should stand sidewise to the highway traffic in [fol. 273] giving the green lamp signals.

In determining the question of whether the Defendant Company was negligent in failing to use ordinary care as charged in the petition you will consider both of the claims of negligence as set forth in the petition and ask yourselves whether the Defendant Company in respect to one or both of these claims did something they should not have done or did not do something that they should have done. If you find by the greater weight of the evidence that in respect to one or both of these claims the Defendant Company did not act as reasonable and careful persons operating a railroad would be accustomed to act under like or similar circumstances and conditions, then and there existing immediately before the injury to the Plaintiff, then you will say that the Defendant Company failed to use ordinary care and was negligent; but if not so proved your verdict will be for the Defendant Company without further deliberation.

If you find the Defendant Company guilty of one or more of the claims of negligence set forth in the petition you will pass to the determination of whether or not this negligence was a direct and proximate cause of the Plaintiff's injuries.

An injury may be the result of no one's negligence or it may be the direct and proximate result of the act of negligence on the part of one person only, or it may be [fol. 274] the direct and proximate result of the negligence of two or more persons or things cooperating and combining to cause one's injury.

If the Plaintiff's injury is the natural and probable consequence of a negligence act or if one or more negligent acts combine and cooperate to proximately and directly cause the injury and the act or acts are such as should have been reasonably anticipated or foreseen in the light of all the attending circumstances, then that one or those persons negligent are responsible.

The proximate cause of an injury is the direct cause, the producing cause, the immediate cause as distinguished from the remote or the indirect cause. It is that cause which in a natural and continuous sequence of events uninterrupted by any efficient intervening cause produces the injury complained of. Now if you find that the Plaintiff has proved the Defendant Company was guilty of negligence as charged by the greater weight of the evidence yet you do not find that that negligence was a direct and proximate cause of the Plaintiff's injury then your verdict will be for the Defendant Company without further deliberation, but if you find the Defendant Company was negligent as charged either in whole or in part and that negligence was a direct and proximate cause of the injury, and all this proved by a preponderance of the evidence you will pass to the question of contributory negligence.

[fol. 275] Contributory negligence is of legal significance and is such an act or omission on the part of the Plaintiff amounting to want or lack of ordinary care which combines or cooperates with the negligent act of the Defendant, if any, and the combined negligence being the proximate cause of the injury complained of.

Contributory negligence never arises unless you find the Defendant was guilty of negligence which directly and proximately caused the Plaintiff's injury.

If the Plaintiff's evidence raises an inference of negligence on his part which he does not dispell with evidence of at least equal weight, or if the Defendant Company proves the Plaintiff guilty of negligence by a preponderance of the evidence then you will say that the Plaintiff was guilty of contributory negligence if you further find by a preponderance of the evidence that that negligence directly and proximately contributed to the Plaintiff's own injury.

In the usual action for personal injury contributory negligence of the Plaintiff is a complete defense and bars the Plaintiff's recovery, but in actions under the Federal Employers Liability Act such as this action, the rule is modified. The Statute is as follows: In all actions hereafter brought against any such common carrier by railroad under or by virtue of the Federal Employers Liability Act [fol. 276] to recover damages for personal injuries to an employee, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

So that if you find the Defendant guilty of negligence as charged and the Plaintiff also guilty of negligence and the negligence of both the Plaintiff and the Defendant along with Ball's negligence cooperated and combined to directly and proximately cause the Plaintiff's injury this Statutory Rule would come into effect. In other words, the Plaintiff's contributory negligence if so proved would not prevent or bar recovery but it would have an important effect upon the situation in that the jury must diminish the damages in proportion to the negligence of the Plaintiff, if any.

It simply means that if the jury reaches the conclusion that the Plaintiff is entitled to recover and also that the Plaintiff is guilty of negligence which proximately contributed to his injury, you must then reach a conclusion as to the total amount of damages sustained by the Plaintiff because of said injury, then decide what proportion of

the joint or combined negligence should be attributed to the Plaintiff, and the total damages suffered by him must then be diminished or cut down by this proportion.

Merely by way of illustration and for no other reason [fol. 277] let us assume that in a case involving the Federal Employers Liability Act both the Plaintiff and the Defendant in that case were found by a preponderance of the evidence to be guilty of joint negligence which combined to proximately cause the Plaintiff's injury, and that the total amount of the Plaintiff's damage was X dollars and the jury considering what proportion the Plaintiff's negligence bore to the combined negligence, determined that the Plaintiff contributed fifty per cent to cause his own injury. So the jury in that case instead of rendering a verdict for X dollars would render a verdict for one-half of X dollars because they found the Plaintiff was one-half to blame. If they found the per cent that the Plaintiff contributed had been but twenty-five per cent they would have diminished the total amount of the damages by one-fourth and rendered a verdict in the sum of three-fourths of X dollars. If they found that the Plaintiff had contributed seventy-five per cent to the total negligence then the jury would diminish the total damages by three-fourths and render a verdict for one-fourth of X dollars. If, however, in the above illustration the Plaintiff was not found guilty of contributory negligence which proximately contributed to his own injury but that the jury found that the Defendant's negligence as charged was a direct and proximate cause of the Plaintiff's injury and this by a preponderance of the evidence they would then have rendered a [fol. 278] verdict for the entire amount or the sum of X dollars. If the defendant in the above case has not been proved guilty of negligence by a preponderance of the evidence or if proved guilty of negligence if not proved by a preponderance of the evidence to have been the direct and proximate cause of the Plaintiff's injury, then the jury in that case would return a verdict for the Defendant Company.

Now the fact that I have given you this illustration should not cause you to conclude that I believe that the Plaintiff should or should not recover. That is a question for you as members of the jury.

In considering the question of contributory negligence you will ask yourselves whether the Plaintiff immediately before the time he was struck by Ball's car, was acting as a reasonable and cautious person engaged as a railroad crossing watchman would be accustomed to act under like or similar circumstances and if you find by the degree of proof charged that he was not acting as such persons would have acted then you will say he was not conducting himself with ordinary care and was therefore negligent, but if not so proved you will no longer consider it a question of contributory negligence.

If such negligence, however, is so established then determine whether this negligence was one of the direct and proximate causes of the Plaintiff's injuries and if so proved [fol. 279] by the degree of proof charged you will say the Plaintiff is guilty of contributory negligence, but if not so proved you will no longer consider this question.

Now in conclusion, if the Plaintiff has not proved the material allegations of his petition by the greater weight of the evidence your verdict will be for the Defendant Company.

The Court charges you that James Ball the operator of the automobile which struck the Plaintiff is guilty of negligence as a matter of law in the operation of his car, and if this negligence be the sole or the only negligence which directly and proximately caused the Plaintiff's injury then your verdict will also be for the Defendant Company.

If you find by the degree of proof charged that Ball and the Plaintiff alone were guilty of negligence which co-operated to directly and proximately cause the Plaintiff's injury your verdict will be for the Defendant Company.

If you find by the degree of proof charged that Ball, the Plaintiff, and the Defendant Company, were all guilty of negligence as charged, your verdict will be for the Plaintiff in a sum that represents his total damage diminished in proportion to the amount of negligence attributable to the Plaintiff.

Now the fact that the Plaintiff was not struck by a train but by an automobile driven by a third party would make [fol. 280] no difference in your verdict providing you find by the greater weight of the evidence that the Defendant Company was guilty of negligence as charged and that this negligence cooperated and combined with the negli-

gence of the driver of the automobile to cause the Plaintiff's injuries and you do not find contributory negligence as charged in this event your verdict will be for the Plaintiff for the total amount of his damages, even though the Defendant Company was only one of two wrongdoers, if you so find, and even though the Plaintiff's injuries resulted from being struck by an automobile driven by a third party and not by any moving train under the direction and control of the Defendant Company. If and when you come to consider the question of damages you will remember that the Plaintiff can recover in whole or in part, as the case may be, only for those injuries which were a direct and proximate result of the Defendant's negligence as charged, if any.

The assessment of damages is solely within the province of the jury guided by the standard rules of common sense and reason. There is no actual standard by which pain and physical suffering can be measured. They are not susceptible of exact valuation and therefore the award of such damages is placed within the hands of the jury.

In determining damages you will take into consideration the nature and extent of the Plaintiff's injuries, the mental anguish, the pain and suffering he has undergone and that [fol. 284] which he is reasonably certain to undergo in the future, if any; the probability of the permanency of the Plaintiff's injuries and the conditions and consequences as you find by the greater weight of the evidence will naturally and probably flow from these injuries, if any, including loss of earnings and incapacity for work, if any. In considering the question of decreased earning capacity you will take into consideration the Plaintiff's age, his former and present state of health, his present ability to earn money and the amount of his wages at the time of his injury. You will allow nothing for doctor, hospital, or medical expenses. After these various sums have been determined you will add them together, and if no contributory negligence is proved against the Plaintiff your verdict will be for him in the total amount, but if he be found guilty of contributory negligence you will diminish the amount of your verdict proportionately to the negligence attributable to the Plaintiff and render your verdict in this sum remembering to be just and fair to both Plaintiff and the Defendant.

When you retire to your jury room you will first of all proceed to elect a foreman. The mere fact that someone is elected foreman doesn't give him or her any more right or power than the rest of you. It means he or she is to preside over your deliberations only that they may be more formal. After that election you will then proceed to deliberate upon the issues in this case. This being a civil [fol. 282] action it will be necessary that at least nine of your number agree upon a verdict. So deliberate upon the issues in this case until at least nine of your number do agree upon a verdict, then those of you who agree upon a verdict will sign that particular form of verdict and report here to the court room where we will receive it. You will notify the Bailiff by the buzzer and return to this room.

The two verdicts I mention, the one nine or more of you sign in the event you find for the Defendant, reads as follows: We the jury being duly impaneled and sworn, find the issues in this case in favor of the Defendant, The Baltimore & Ohio Railroad Company.

Then you will put the date on there. Nine or more of your number must sign that verdict for the Defendant.

The form for the Plaintiff reads as follows: We the jury being duly impaneled and sworn find the issues in this case in favor of the Plaintiff and assess the amount due the Plaintiff from the Defendant in the sum of X dollars; and then, of course, you put the date down and those of you who have arrived at this verdict, providing there are nine or more, sign that particular verdict.

You will have with you these Special Instructions I have given you before Argument, and as I have indicated you are to consider these along with the general charge I have just given you as being the law that is applicable to the [fol. 283] facts in this case. You will likewise have with you in your jury room Special Findings of Fact.

The first is: Do you find that the Defendant was negligent? And then if your answer to that be no, then of course nine or more of you will sign that and you won't have to answer the second, but if your answer to that be yes then you will to answer Number 2. If your answer to Number 1 is in the affirmative state what said negligence consisted. Nine or more of you then have to sign this particular Finding of Fact. You will also have with you Exhibits which

have been properly introduced, as well as the Eye Projector.

I believe that's all.

Mr. Roetzel: I have something I'd like to take up with you.

(Thereupon the Court, Attorneys, and Court Reporter retired to the Court's Chambers.)

(Discussion off the Record.)

(Court, Attorneys, and Court Reporter return to court room.)

The Court: All right.

Mr. Roetzel: One other thing, you spoke as to future pain, pain and suffering that which is reasonably certain. We request the Court charge the jury that such has been proven by the greater weight of the medical evidence; we also request the Court to charge the jury that concerning [fol. 284] that part of his charge which has to do with the awarding of damages for future pain, suffering, or disability, the charge be amended by stating the jury may award damages for the elements as are proven by the greater weight of the medical evidence to be reasonably certain to continue or exist in the future.

The Court: Overruled.

Mr. Roetzel: Exception. The Defendant requests the Court charge on these various Statutes. We think it makes a difference what laws the man violated and whether or not the Defendant was exercising ordinary care.

The Court: No, I'll overrule it.

Mr. Roetzel: The Court declines to charge on any of the Statutes which under the evidence, upon which there is evidence of violation of James Ball, the driver of the automobile.

The Court: Yes.

Mr. Roetzel: We object to the charge as given and object to the failure of the Court to further charge.

Mr. McGowan: Let the record show the Plaintiff excepts to the charge of the Court, generally, and to each and every part thereof.

(Thereupon the Jury retired to deliberate.)

[fol. 285] Reporter's Certificate to foregoing transcript omitted in printing.

NOTE

PAGES 212 - 228 ARE ON CARD 5

PAGES 229 - 237 ARE ON CARD 6

[fol. 312]

IN THE COURT OF COMMON PLEAS

INTERROGATORIES AND ANSWERS THERETO BY JURY—
September 17, 1956

No. 1

Question: Do you find that the defendant was negligent?

Answer: In part.

Joseph W. Belair, Melvin L. Mackey, Inez Sellers, Wilma
Shell, Mary Kline, Mary Gebert, Charles S. Hartline, Eva
B. Leidal, Olive Ocasek.

[File endorsement omitted]

[fol. 313]

No. 2

Question: If your answer to Question No. 1 is in the
affirmative, state of what said negligence consisted.

Answer: Not providing enough protection.

Joseph W. Belair, Melvin L. Mackey, Inez Sellers, Wilma
Shell, Mary Kline, Mary Gebert, Eva B. Leidal, Charles S.
Hartline, Olive Ocasek.

[fol. 314]

IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

September Term, A. D. 1956

No. 194077

CARL C. INMAN, Plaintiff,

vs.

BALTIMORE & OHIO RAILROAD Co., Defendant.

Civil Action—Verdict for Plaintiff

VERDICT FOR PLAINTIFF (REVISED CODE SEC. 2315.13)—

September 17, 1956

We, the Jury, being duly impaneled and sworn and affirmed, find the issues in this case in favor of the Plaintiff, and assess the amount due the Plaintiff from the Defendant the said Baltimore & Ohio Railroad Co., at the sum of Twenty-five thousand dollars (\$25,000.) Dollars.

And we do so render our verdict upon the concurrence of 9 members of our said Jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 17 day of September 1956.

7. Joseph W. Belair, 2. Eva B. Leidal, 3. Mary Kline,
4. Mary Gebert, 6. Wilma Shell, 1. Charles S. Hartline,
8. Inez Sellers, 10. Olive Ocasek, 11. Melvin L. Mackey.

[fol. 315] [File endorsement omitted]

[fol. 316] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS

CARL C. INMAN, Plaintiff,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

JOURNAL ENTRY OF JUDGMENT—October 3, 1956

This cause came on to be heard on the pleadings and upon the issues joined and trial had upon the evidence

presented, a jury having been duly impaneled, did on the 17th day of September, 1956, return a verdict in favor of the plaintiff and against the defendant in the sum of Twenty-Five Thousand Dollars (\$25,000.00), and now coming to enter judgment on the verdict of the jury, it is ordered by the Court that judgment be, and the same hereby is, rendered against the defendant and in favor of the plaintiff in the sum of Twenty-Five Thousand Dollars (\$25,000.00), together with the costs of this action.

Exceptions are hereby granted to defendant.

Claude V. D. Emmons, Judge.

Approved: Ray J. McGowan, Rosser J. Jones, Attorneys
for Plaintiff.

Wise, Roetzel, Maxon, Kelly & Andress, Attorneys for
Defendant.

[fol. 318]

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Jl 382-374

[File endorsement omitted]

[fol. 319]

[File endorsement omitted]

IN THE COURT OF COMMON PLEAS

No. 194077

[Title omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT—
Filed October 11, 1956

The defendant moves the Court to render judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict for the plaintiff rendered by the jury and the judgment in favor of the plaintiff rendered on said verdict.

Wise, Roetzel, Maxon, Kelly & Andress, 1110 First National Tower, Akron 8, Ohio, Attorneys for defendant.

BRIEF

O.R.C. Sec. 2315.17,
O.R.C. Sec. 2323.18,
O.R.C. Sec. 2323.181,

and other reasons which will be stated during oral argument, which is hereby requested.

Respectfully submitted,

Wise, Roetzel, Maxon, Kelly & Andress, Attorneys
for defendant.

A copy of foregoing has been served upon Ray J. McGowan, attorney for plaintiff, this 11th day of October, 1956.

C. G. Roetzel, of counsel.

[fol. 320] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS

[Title omitted]

MOTION TO VACATE JUDGMENT AND FOR A NEW TRIAL—
Filed October 11, 1956

Defendant moves the Court to vacate the judgment in favor of the plaintiff for \$25,000.00 heretofore entered on the verdict of the jury in that amount, and for a new trial, for the following causes, each of which materially affect the substantial rights of the defendant.

1. The Court erred in admitting evidence offered by the plaintiff over the objection of the defendant.
2. The Court erred in refusing to admit evidence offered by the defendant.
3. The Court erred in overruling the separate motions of the defendant to withdraw each specification of negli-

gence from the consideration of the jury at the close of all the evidence.

4. The Court erred in overruling the motion of defendant for a directed verdict and for judgment in favor of the defendant at the close of plaintiff's case.

5. The Court erred in overruling the motion of the defendant for a directed and for judgment in favor of the defendant at the close of all the evidence.

6. The Court erred in giving written instructions of law before argument requested by the plaintiff.

7. The Court erred in refusing to give written instructions of law before argument requested by the defendant.

[fol. 321] 8. The Court erred in its general charge to the jury.

9. The Court erred in refusing to give to the jury instructions of law as a part of the general charge, as requested by the defendant.

10. The Court erred in refusing to correctly charge the jury as a part of its general charge on subject matters requested by the defendant.

11. The Court erred in overruling the objection of the defendant to the acceptance of the answers of the jury to the special findings of fact, and in overruling the objection of the defendant to the acceptance of the general verdict and rendering judgment thereon.

12. The verdict of the jury and the judgment entered thereon are not sustained by sufficient evidence.

13. The verdict of the jury and the judgment entered thereon are contrary to law.

14. The verdict of the jury and the judgment entered thereon are excessive and the verdict appears to have been given under the influence of passion and prejudice.

15. Errors of law occurring at the trial, objected or excepted to by the defendant.

16. Other errors apparent upon the record.

Wise, Roetzel, Maxon, Kelly & Andress, 1110 First National Tower, Akron, Ohio, Attorneys for defendant.

BRIEF

O.R.C. Sec. 2321.17

Oral argument is requested.

Respectfully submitted,

Wise, Roetzel, Maxon, Kelly & Andress, Attorneys for defendant.

A copy of foregoing has been served upon Ray J. McGowan, attorney for plaintiff, this 11th day of October, 1956.

C. G. Roetzel, of counsel.

[fol. 322]

[File endorsement omitted]

IN THE COURT OF COMMON PLEAS

[Title omitted]

JOURNAL ENTRY OVERRULING MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT—Filed July 22, 1957

This cause came on to be heard on the Motion of the defendant for a judgment notwithstanding the verdict, and upon due consideration thereof, the Court finds that said Motion is not well taken.

It is Therefore, Ordered, Adjudged and Decreed that said Motion filed by the defendant for a judgment notwithstanding the verdict herein, be and the same is hereby overruled, to which the defendant excepts.

Claude V. D. Emmons, Judge.

Approved: Ray J. McGowan, Attorney for Plaintiff.

Wise, Roetzel, Maxon, Kelly & Andress, By C. G. Roetzel, Attorneys for Defendant.

[fol. 323]

[File endorsement omitted]

IN THE COURT OF COMMON PLEAS

[Title omitted]

JOURNAL ENTRY OVERRULING MOTION FOR NEW TRIAL—
Filed July 22, 1957

This cause came on to be heard on the Motion of the defendant for a new trial herein, and upon due consideration thereof, the Court finds that said Motion is not well taken.

It is Therefore, Ordered, Adjudged and Decreed that said Motion filed by the defendant herein for a new trial be, and same is hereby overruled, to which the defendant excepts.

Claude V. D. Emmons, Judge.

Approved: Ray J. McGowan, Attorney for Plaintiff.

Wise, Roetzel, Maxon, Kelly & Andress, by C. G. R.,
Attorneys for Defendant.

[fol. 324]

[File endorsement omitted]

IN THE COURT OF COMMON PLEAS

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—
Filed August 9, 1957

The defendant hereby gives notice of appeal to the Court of Appeals from a judgment rendered by the Court of Common Pleas in the above entitled cause on the 3rd day of October, 1956.

Said Appeal Is On Questions Of Law.

Wise, Roetzel, Maxon, Kelly & Andress, Attorneys
for Defendant-Appellant.

A copy of the foregoing Notice of Appeal was personally served on Ray McGowan, Attorney for Plaintiff-Appellee, this 9th day of August, 1957.

C. G. Roetzel, of counsel, for Defendant-Appellant.

[fol. 325]

IN THE COURT OF APPEALS

No. 4752

CARL C. INMAN, Plaintiff-Appellee,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellant.

ASSIGNMENTS OF ERROR—Filed September 28, 1957.

State of Ohio,

Summit County, ss.:

The defendant-appellant, The Baltimore and Ohio Railroad Company, prosecutes this appeal contending that error prejudicial to its rights intervened in the trial of this cause, in that:

1. The Trial Court erred in overruling the motion of defendant for judgment notwithstanding the verdict.
2. The Trial Court erred in overruling the motion of defendant for a new trial.
3. The Trial Court erred in overruling the motion of defendant for a directed verdict and for judgment in its favor at the close of all the evidence.
4. The Trial Court erred in admitting evidence offered by the plaintiff over the objection of the defendant.
5. The Trial Court erred in refusing to admit evidence offered by the defendant.

6. The Trial Court erred in overruling the separate motions of defendant to withdraw each specification of negligence from the consideration of the jury at the close of all the evidence.
7. The Trial Court erred in giving written instructions of law before argument requested by the plaintiff.
- [fol. 326] 8. The Trial Court erred in refusing to give written instructions of law before argument requested by the defendant.
9. The Trial Court erred in its general charge to the jury.
10. The Trial Court erred in refusing to give to the jury instructions of law as a part of the general charge, as requested by the defendant.
11. The Trial Court erred in refusing to correctly charge the jury as a part of its general charge on subject matters requested by the defendant.
12. The Trial Court erred in overruling the objection of the defendant to the acceptance of the answers of the jury to the special findings of fact, and in overruling the objection of the defendant to the acceptance of the general verdict and rendering judgment thereon.
13. The verdict of the jury and the judgment entered thereon are not sustained by sufficient evidence.
14. The verdict of the jury and the judgment entered thereon are contrary to law.
15. The verdict of the jury and the judgment entered thereon are excessive and the verdict appears to have been given under the influence of passion and prejudice.
16. Errors of law occurring at the trial, objected or excepted to by the defendant.
17. Other errors apparent upon the record.

/s/ C. G. Roetzel, Wise, Roetzel, Maxon, Kelly &
Andress, 1110 First National Tower, Akron 8,
Ohio, Attorneys for Defendant-Appellant.

/s/ C. G. Roetzel, Of Counsel.

[fol. 328] [File endorsement omitted]

[fol. 329]

IN THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT

No. 4752

Argued March 26, 1958.

CARL C. INMAN, Appellee,

v.

THE BALTIMORE & OHIO RAILROAD Co., Appellant.

APPEAL ON QUESTIONS OF LAW

Ray J. McGowan and Rosser J. Jones, For Appellee.

Wise, Roetzel, Maxon, Kelly & Andress, For Appellant.

OPINION—Decided May 7, 1958

STEVENS, J.

The action filed in the Court of Common Pleas of Summit County, Ohio, by plaintiff, sought the recovery of damages for personal injuries sustained by him while in the performance of his duties as a crossing flagman at Home and Tallmadge Avenues in the city of Akron.

The defendant in the trial court is a railroad company, engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, and the plaintiff was an employee of defendant, concededly within the class of persons entitled to the benefits of that Act.

[fol. 330] The petition of plaintiff alleged that:

On January 2, 1952, plaintiff, while discharging his duties as crossing flagman, was standing on Tallmadge Avenue, at a point just west of defendant's tracks at the Home Avenue intersection with Tallmadge Avenue, warning the traveling public of the presence of one of defendant's trains, when he was suddenly and violently struck by an automobile being driven in a northeasterly direction on Home Avenue and making a left turn into Tallmadge Avenue at said intersection, with resultant serious injuries.

As the case was submitted to the jury by the trial court, the petition contained the following specifications of negligence:

1. " * * * the defendant negligently and carelessly ordered and directed plaintiff to perform his duties as a flagman at said crossing, when it was impossible for him to observe vehicles entering said intersection from Home Avenue and without taking any measures to prevent him from being struck, as aforesaid."

2. " * * * failed to place another employee at said crossing to watch for other trains approaching said crossing, while plaintiff was on duty flagging, to the end that plaintiff could keep a lookout and watch for traffic proceeding from Home Avenue into said intersection, and particularly the vehicle that struck plaintiff as aforesaid."

[fol. 331] For answer to the petition of plaintiff as subsequently amended, defendant admitted the following:

1. Its corporate existence as a railroad, owning and operating railroad lines through several parts of the United States, one of which lines extends into and through the city of Akron, Ohio.

2. That on January 2, 1952, plaintiff and defendant were engaged in interstate commerce.

3. That Tallmadge and Home Avenues were duly dedicated public streets in the city of Akron, which intersected.

4. On information and belief, that on or about January 2, 1952, at 12:10 a.m., while plaintiff was on duty as a flagman at the above-mentioned intersection, he was struck by

an automobile and sustained some personal injuries, but denied that the same were of the nature and character alleged.

All other allegations of the petition were denied.

Upon trial to a jury, a verdict for plaintiff in the amount of \$25,000 was returned, upon which judgment was duly entered.

This appeal on questions of law ensued.

The pleadings in this case do not, in terms, present the claim of plaintiff that defendant negligently failed to furnish plaintiff with a safe place to work, under the Federal Employers' Liability Act. However, in view of the pro-[fol. 332] nouncement in par. 16 of the syllabus in *Denny v. Montour Rd. Co.*, 101 Fed. Supp. 735, that question was in the case, and the court was required to charge thereon.

It is stated in *Ellis v. Union Pacific Rd. Co.*, 329 U.S. 649; at p. 653:

"The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. 45 USCA Sec. 51, 10 AFCA title 45, Sec. 51 * * *."

In *Bailey, Admx. v. Central Vermont Ry., Inc.*, 319 U.S. 350, the fourth paragraph of the syllabus states:

"4. An employer is under a common-law duty to use reasonable care in furnishing his employees with a safe place to work."

It is thus apparent that, while the Act itself does not in terms require the employer to furnish the employee with a safe place to work, the cases decided by the Supreme Court of the United States under the Act, do impose upon the employer the common-law duty to exercise reasonable care to furnish his employee with a safe place to work.

The basis for recovery by an injured employee under the Federal Employers' Liability Act is therefore negligence of the employer in failing to provide a safe place

for the employee to work, which negligence proximately causes, in whole or in part, the injuries of which complaint is made.

In 29 O. Jur., Negligence, Sec. 68, the following appears:

[fol. 333] "It is a well-established rule that to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence alleged, and that it was such as might or ought to have been foreseen in the light of the attending circumstances. In contemplation of law, an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable."

Let us now examine this record in the light of the foregoing statement of the applicable rules.

Tallmadge Avenue, an east and west traffic artery in the city of Akron, is intersected by Home Avenue, a street running in a northeasterly and southwesterly direction. Three tracks of defendant extend through the intersection of these two streets in a northwesterly and southeasterly direction, the most easterly being a switch track, the middle track the eastbound main track, and the most westerly the westbound main track.

The defendant installed the following equipment to warn the defendant and the traveling public of the approach of trains to said crossing:

Highway warning signals known as "flasher lights" at all street approaches to the crossing, consisting of two lights with red lenses directed toward approaching traffic, which, when activated, gave a flashing signal warning to motorists of the approach of a train. On the side of the [fol. 334] body of these lights were windows which emitted a white light when the lights were in operation.

In the watchman's shanty at the southeast corner of Tallmadge Avenue, the defendant installed a warning or "tell-tale" light to warn the watchman of the approach of trains, and a listening phone on which could be heard the dispatcher at XX Tower, 1½ miles north of the crossing.

issuing orders to trains and giving their location on the line.

Outside the shanty, on a 25-foot pole near the south curb of Tallmadge Avenue east of the crossing, was an amber light, which was activated and would light up when trains approached the crossing.

To the south of the crossing was a block signal on a mast 27 feet high, consisting of a disc with two red lights in a horizontal position, and two yellow lights in a diagonal position, with a white light in the center of the disc.

A red signal appeared when a westbound train was within the block, requiring the engineer of the following train to stop before reaching the signal.

A yellow signal required the engineer of a westbound train in the block to reduce his speed to 35 miles an hour.

The white light, which could be seen from the crossing, would appear when either the red or yellow signal was in operation.

[fol. 335] When none of said lights was in operation, this indicated the absence of a westbound train from the block.

As an eastbound train approached the crossing, at a point 2066 feet south of the crossing, the wheels of the train would strike an insulated joint, which put in operation the flasher light circuit, the block signal circuit, the "tell-tale" light in the watchman's shanty, and the amber light on top of the pole near the south curb line of Tallmadge Avenue—all of which signals would remain in operation until the last car of the eastbound train passed over another insulated joint 75 feet north of the crossing, when all of said signals would discontinue operating.

Upon the approach of a westbound train to the crossing, when the wheels thereof reached a point 3455 feet north of the crossing, they would strike an insulated joint, setting into operation the block signal heretofore mentioned, the "tell-tale" light in the watchman's shanty, and the amber light south of the curb on Tallmadge Avenue.

When the wheels had reached a point 2000 feet north of the crossing, the flasher lights would be activated, and would continue to operate until the wheels of the last car passed over an insulated joint 105 feet south of the crossing, which would deactivate them.

The evidence shows all of these signals to have been in proper working order on January 2, 1952, at the time here [fol. 336] in question.

In addition to the foregoing, the crossing flagman was furnished with one "stop" disc sign, three red flags for use by day, two red lanterns, one white lantern, and one green lantern, for use when flagging at night, six or more fuses, six or more torpedoes, and a shrill whistle.

Stop signs were erected for Home Avenue traffic approaching the crossing from the south, on the right or easterly side of Home Avenue before the tracks were reached, and near the intersection of Home Avenue where it joined Tallmadge Avenue—the latter being a main thoroughfare.

The crossing and intersection were well lighted by street lights at the time under consideration.

The plaintiff, on January 2, 1952, had been employed by defendant as a crossing watchman for about three years, working the 11 p.m. to 7 a.m. shift at the Bettes Corners grade crossing.

Shortly after midnight on said date, the tell-tale light in the watchman's shanty started flashing, indicating the approach of a train from the west, and the other warning signals heretofore described went into operation.

In accordance with his instructions, plaintiff stationed himself in the center of Tallmadge Avenue, to the west of the crossing, two to three feet west of the westerly rail of the westbound track, having with him his whistle, and [fol. 337] lighted red and green lanterns.

When the train got close enough to the crossing, plaintiff blew his whistle and began swinging his red lantern.

While thus engaged, one James Ball was stopped on Home Avenue in a line of traffic, several cars back from the intersection of Home Avenue and Tallmadge Avenue.

There is uncontroverted evidence in this record that, at the time of plaintiff's injury, Ball was under the influence of alcohol.

As the train passed over the crossing, plaintiff took a step backward, when he was struck by Ball's automobile, which had left the northbound line of traffic on Home Avenue, and had proceeded northerly upon the left, or

westerly, side thereof, to the intersection of Home and Tallmadge Avenues, where Ball, at a high rate of speed, made a short turn onto Tallmadge Avenue, and, proceeding westerly, collided with and injured plaintiff.

In so doing, Ball violated five state traffic statutes, and municipal ordinances of the city of Akron dealing with the same subjects.

At the conclusion of all the evidence, defendant moved for a directed verdict, which motion was overruled; and after the return of the verdict for plaintiff, defendant moved for a judgment notwithstanding the verdict, which [fol. 338] motion was also overruled.

There are seventeen assignments of error presented by appellant, only a few of which will be discussed.

The assignment of error designated "1(a)" in appellant's brief, dealing with the alleged inconsistency between the special findings of fact and the general verdict, is, in our opinion, completely negatived by the decision of the Supreme Court of the United States in the case of *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 1 L.Ed. 2d 889.

We find no prejudicial error in connection with this assignment.

Assignment "1(b)" asserts:

"The Trial Court erred in overruling the motion of defendant for judgment notwithstanding the verdict, based on the failure of plaintiff's proof; the Trial Court erred in overruling the motion of defendant for a directed verdict and for judgment in its favor at the close of all the evidence."

The entire record in this case has been studied by the members of this court, as have been the law and the cases defining the obligations of the parties to this litigation.

If the predicate for liability of defendant employer is negligence, which proximately caused, in whole or in part, the injuries complained of by plaintiff, then, as part of the subject of proximate cause, the question of foreseeability was presented.

There is no evidence in this record of failure on the [fol. 339] part of defendant to furnish plaintiff with all of the safeguards in the performance of his work, which reasonably prudent operators of railroads furnish under like or similar circumstances. And there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff.

That the plaintiff, while in the discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, was not, in our opinion, such an occurrence as, under the evidence in this record, was reasonably foreseeable by defendant.

There was, accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it.

To abridge the statement of the court in *Orton v. Pennsylvania Rd. Co.*, 7 F.2d 36, at p. 38:

"The most that can be said for plaintiff is that the defendant created a situation in which" the negligence of James Ball "operated to bring about the" injury * * *. "Defendant's act was merely a condition and in no sense a concurring proximate cause of the injury."

We hold that the court prejudicially erred when it overruled defendant's motion for a directed verdict, made at the conclusion of all the evidence, because there was a [fol. 340] complete failure of proof to establish the negligence alleged in the petition, or any negligence of defendant which proximately caused, in whole or in part, the injuries to plaintiff. *Lavender, Admr., etc. v. Kurn, et al., etc.*, 327 U.S. 645, 90 L.Ed. 916, par. 4 of syllabus.

Likewise, there was prejudicial error in overruling the motion of defendant for judgment notwithstanding the verdict, for the reasons above set forth.

It is next asserted that "The trial court erred in overruling the separate motions of defendant to withdraw each specification of negligence" contained in plaintiff's petition

as heretofore set forth "from the consideration of the jury at the close of all the evidence."

Inasmuch as we have determined that there was a complete failure of proof to substantiate the allegations of negligence contained in the petition, or included therein under the pronouncements of the federal courts, we conclude that the motions to withdraw the specifications of negligence from the consideration of the jury, at the close of all the evidence, should have been sustained; and that the court prejudicially erred in overruling said motions.

Assignment of error No. 7 charged that "The trial court erred in giving written instructions of law before argument requested by the plaintiff."

Instruction 2 stated:

[fol. 341] " * * * the defendant * * * owed a duty to its employee Carl C. Inman to use reasonable care to provide him with a reasonably safe place in which to work * * *."

Instruction 4 provided: .

" * * * that reasonable care is that degree of care which a reasonable man maintains in similar circumstances. The reasonable care which the defendant railroad owed to plaintiff * * * was that degree of care which a reasonably prudent person operating a railroad would use, having in mind the dangers of such an operation and the requirements of reasonably providing for the safety of the railroad's employees."

It is urged that these instructions were prejudicially erroneous because they introduced an issue not raised by the pleadings viz., whether defendant exercised reasonable care to provide plaintiff with a reasonably safe place to work.

The case of *Denny v. Montour Rd. Co.*, supra, paragraph 16 of the syllabus, makes appellant's contention in this respect untenable.

As to the other claims of appellant, concerning the special charges before argument requested by plaintiff and given by the court, we find them not to be well taken.

The next error assigned by appellant is, that "The trial court erred in refusing to give written instructions of law before argument requested by defendant."

The defendant requested the court to give defendant's written instructions 4, 5, 6, 7 and 8 before argument, which requests, as to all of said instructions, were refused by [fol. 342] the court.

Each of those instructions contained a statement of a statutory traffic provision in the words of the statute, together with the following statement:

" * * * the court further says to you that, under the undisputed evidence of this case, the operator of the motor vehicle which came into collision with plaintiff violated this requirement of law and that defendant, in the exercise of ordinary care to provide plaintiff a reasonably safe place to work, was not required to anticipate or foresee such violation."

The violation of all of said statutes by Ball, the driver of the auto which struck plaintiff, is not denied.

There is contained in this record no evidence of previous occurrences of like nature at this crossing, involving injury to a crossing watchman.

It is stated in 29 O. Jur., Negligence, Sec. 95:

"It is a well-established rule that, in the absence of knowledge to the contrary, an individual to whom a duty is owed has a right to assume that it will be performed. This rule applies to duties arising by force of statutes or ordinances * * *."

Henderson v. Cleveland Ry. Co., 123 O.S. 468, is cited as supporting authority, as is Cleveland Ry. Co. v. Goldman, 122 O.S. 73.

All of the statutes in question were passed for the benefit of users of the public highways, to which class both plaintiff and defendant belonged, and Ball owed to both plaintiff and defendant the duty to comply with the statutory provisions; and, in the absence of knowledge that Ball refused to comply with his statutory duties, both plaintiff and defendant had a right to assume that he would comply therewith.

As bearing upon the question of whether the defendant exercised ordinary care in providing the plaintiff with a reasonably safe place to work, it is our conclusion that, relating to the question of foreseeability, in connection with the subject of proximate cause, the five requests of defendant to charge before argument should have been given, and that the refusal to so charge constituted prejudicial error.

There was also prejudicial error because of the refusal of the court to include the contents of the requested charges before argument, or a correct statement of law on the subject matter of each, in its general charge, upon being requested so to do by defendant.

There was error in the charge of the court in stating that James Ball, the operator of the motor vehicle which struck plaintiff, was guilty of negligence as a matter of law, without instructing the jury of what that negligence consisted.

We further hold that the trial court prejudicially erred in overruling the defendant's motion for a new trial; that the verdict and the judgment entered thereon are not sustained by any probative evidence; and that the judgment is [fol. 344] contrary to law.

As to the other errors assigned but not discussed herein, we hold none of them to have constituted prejudicial error.

The judgment is reversed, and this court will enter the judgment which the trial court should have entered. Final judgment in favor of defendant will be entered, at the costs of plaintiff.

HUNSICKER, P.J., and DOYLE, J., concur.

[fol. 345] [File endorsement omitted]

IN THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT

May, 1958, Term

No. 4752

CARL C. INMAN, Plaintiff-Appellee,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellant.

JUDGMENT REVERSED AND JUDGMENT ENTERED FOR
DEFENDANT-APPELLANT—Filed June 2, 1958

The said parties appeared by their Attorneys, and this cause came on to be heard upon the Notice of Appeal of said The Baltimore and Ohio Railroad Company, Defendant-Appellant herein, together with the Assignments of Error of said Appellant, a Transcript of the Docket or Journal Entries of the Court of Common Pleas of Summit County, Ohio, and such original papers, or transcripts thereof, as were necessary for said appeal, filed therewith in the said Court of Common Pleas of Summit County, Ohio, wherein said Carl C. Inman was Plaintiff and said The Baltimore and Ohio Railroad Company was Defendant, mentioned and referred to in said Notice of Appeal, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid, there is error manifest upon the face of the record to the prejudice of the Appellant, in this, to-wit:

- (a) That said Court of Common Pleas erred in overruling the motion of said Defendant for a directed verdict and for judgment in its favor at the close of all the evidence, because there was a complete failure of proof to establish the negligence alleged in the petition;

- (b) That said Court of Common Pleas erred in overruling the motion of said Defendant for judgment notwithstanding the verdict, because there was a complete failure of proof to establish the negligence alleged in the petition;
- (c) That said Court of Common Pleas erred in overruling the separate motions of said Defendant to [fol. 346] withdraw each specification of negligence from the consideration of the Jury, made at the close of all the evidence;
- (d) That said Court of Common Pleas erred in refusing to give written instructions of law numbered 4, 5, 6, 7 and 8 before argument requested by said Defendant;
- (e) That said Court of Common Pleas erred in refusing to give to the Jury each of said written instructions of law numbered 4, 5, 6, 7 and 8 as a part of the general charge, upon being requested so to do by said Defendant;
- (f) That said Court of Common Pleas erred in refusing to correctly charge the Jury, as a part of the general charge, on subject matters contained in each of said written instructions of law numbered 4, 5, 6, 7 and 8, as requested by said Defendant;
- (g) That said Court of Common Pleas erred in its general charge by stating that James Ball, the operator of the motor vehicle which struck said Plaintiff, was guilty of negligence as a matter of law, without instructing the Jury of what that negligence consisted;
- (h) That said Court of Common Pleas erred in overruling the motion of said defendant for a new trial;
- (i) That the verdict of the Jury and the Judgment rendered thereon by said Court of Common Pleas are not sustained by any probative evidence;
- (j) That the Judgment of said Court of Common Pleas is contrary to law;

and in that said Court of Common Pleas entered judgment for said Plaintiff-Appellee, when such judgment should have been entered for said Defendant-Appellant.

It is, therefore, considered, ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Summit County, Ohio, be and the same is hereby reversed and held for naught. And this Court coming now to render the judgment which the Court of Common Pleas of Summit County, Ohio, ought to have rendered, final judgment is now entered in this Court for said Defendant-Appellant.

[fol. 347] It is further ordered that this cause be remanded to the Court of Common Pleas of Summit County, Ohio, to carry this judgment into effect and for execution; and that said Plaintiff-Appellee pay the costs of this proceeding taxed at \$..... and in default thereof that an execution issue therefor.

To all of which said Plaintiff-Appellee, by counsel, excepts.

Oscar Hunsicker, Presiding Judge for the Court.

Approved: Raymond J. McGowan, Attorney for Plaintiff-Appellee.

Wise, Roetzel, Maxon, Kelly & Andress, Attorneys for Defendant-Appellant.

[fol. 348]

IN THE COURT OF APPEALS, NINTH JUDICIAL DISTRICT

AMENDED NOTICE OF APPEAL—Filed June 16, 1958

Carl C. Inman, plaintiff-appellee, in the above entitled action, hereby files in this Court notice of his intention to appeal to the Supreme Court of Ohio from a judgment of the Court of Appeals of the Ninth Judicial District of Ohio, rendered on June 2, 1958, wherein the judgment and proceedings of the Court of Common Pleas in favor of Carl C. Inman, plaintiff-appellee against The Baltimore & Ohio Railroad Company, defendant-appellant was reversed and final judgment rendered for said defendant-appellant.

This appeal is taken.

(a) as of right in a case involving questions arising under the Constitution of Ohio and the United States,

(b) Involves matters of both public and great general interest.

(c) On condition that a Motion to Certify be allowed by the Supreme Court.

/s/ Ray J. McGowan, Attorney for Plaintiff-Appellee.

Duly Acknowledged.

Filed, Court of Appeals, Summit County, June 16, 1958.

Filed, Supreme Court of Ohio, June 17, 1958.

[fol. 349]

IN THE SUPREME COURT OF OHIO

Case No. 35698

CARL C. INMAN, Plaintiff-Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

MOTION FOR AN ORDER TO CERTIFY RECORD—

Filed June 17, 1958

Carl C. Inman, Plaintiff-Appellant herein, respectfully represents that at the May term of the Court of Appeals for the Ninth Judicial District, Summit County, Ohio, to wit: on the 2nd day of June, 1958, in an action pending in said court in which Carl C. Inman was Plaintiff-Appellee, and The Baltimore & Ohio Railroad Company was Defendant-Appellant, being Cause No. 4752 on the docket of said court, said Court of Appeals rendered a judgment in favor of the Baltimore & Ohio Railroad Company, Defendant-Appellant, against Carl C. Inman, Plaintiff-Appellee, re-

versing the judgment in favor in Carl C. Inman against The Baltimore & Ohio Railroad Company in the Court of Common Pleas of Summit County, Ohio, and rendered final judgment in favor of said Defendant-Appellant, The Baltimore & Ohio Railroad Company.

Carl C. Inman represents to the Court that there is attached hereto a copy of the Notice of Appeal and a copy of the Amended Notice of Appeal filed in said Court of Appeals and with the Clerk of this Court on the day of June, 1958, with proof of service; that there is filed herewith a copy of the Brief of Plaintiff-Appellant, containing an assignment of errors; a statement of the questions of law presented by the record; a statement of the case and the argument on behalf of Plaintiff-Appellant in which is incorporated a true copy of the Journal Entry of said Court of Appeals and copies of the opinions rendered in the case by said Court of Appeals.

Carl C. Inman further represents and shows to the Court that this is a case involving questions arising under the Constitution of Ohio and the United States, and is a case of both public and great general interest, and that error to the rights of Carl C. Inman has intervened in the proceedings in said Court of Appeals.

Wherefore, Carl C. Inman makes application to this court and prays for an order directing the Court of Appeals for the Ninth Judicial District, Summit County, Ohio, to certify its record for review and correction according to law.

/s/ Ray J. McGowan, 603 Second National Building,
Akron 8, Ohio, Attorney for Plaintiff-Appellant.

Duly Acknowledged.

[fol. 351]

IN THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio
City of Columbus

No. 35698

CARL C. INMAN, Plaintiff-Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the Court of Appeals of Summit County

ORDER DISMISSING APPEAL AS OF RIGHT—

November 12, 1958

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at \$.....

Ordered, That a special mandate be sent the Court of Common Pleas of Summit County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry".

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 352]

THE SUPREME COURT OF OHIO

The State of Ohio
City of Columbus

To the Honorable Court of Common Pleas

Within and for the County of Summit, Akron, Ohio,
Greeting:

We do hereby command you, that you proceed, without delay, to carry the within and foregoing judgment of the Supreme Court of Ohio, in the cause of

CARL C. INMAN, Plaintiff-Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD CO.,
Defendant-Appellee.

into execution.

Witness, Elliot E. Welch, Clerk of the Supreme Court of Ohio, this 19th day of November, A. D. 1958.

Elliot E. Welch, Clerk.

Docket Fee, \$2.00, Paid by Wise, Roetzel, Maxon, Kelly & Andress.

Jl. 12-544

THE SUPREME COURT OF THE STATE OF OHIO

No. 35698

CARL C. INMAN, Plaintiff-Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant-Appellee.

MANDATE

(Rubber Stamp)

Filed
Court of Appeals
Nov 20 1958
Summit Co., Ohio
Frank P. Yacobucci, Clerk of Courts

[fol. 353]

(Rubber Stamp)

Filed
Court of Appeals
Nov 20 1958
Summit Co., Ohio
Frank P. Yacobucci, Clerk of Courts

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 35698

CARL C. INMAN, Plaintiff-Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant-Appellee.

ORDER OVERRULING MOTION FOR AN ORDER DIRECTING THE
COURT OF APPEALS OF SUMMIT COUNTY TO CERTIFY ITS
RECORD—November 12, 1958

It is ordered by the Court that this motion be, and the
same hereby is, overruled.

Costs: Motion Fee, \$20.00, paid by Ray J. McGowan.

Clerk's Certificate to foregoing paper (omitted in print-
ing).

[fol. 355]

IN THE SUPREME COURT OF OHIO
Case No. 35698

[Title omitted]

APPLICATION FOR REHEARING—Filed November 21, 1958

To the Honorable Judges of the Supreme Court of Ohio:

Plaintiff-Appellant respectfully makes Application to this Court for a re-hearing and re-argument of this cause on the Motion for an Order directing the Court of Appeals of Summit County, Ohio to certify its record in this cause.

Respectfully submitted,

/s/ McGowan, Scanlon & Lombardi, 603 Second
National Building, Akron 8, Ohio, Attorneys for
Plaintiff-Appellant.

Duly Acknowledged.

Filed, Supreme Court of Ohio, November 21, 1958.

[fol. 356]

IN THE SUPREME COURT OF OHIO

MEMORANDA OF PLEADINGS, ETC., FILED, WRITS ISSUED, ETC.
JUDGMENTS, ORDERS AND DECREES

Journal 42, Page 712

ORDER DENYING REHEARING—December 3, 1958

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fol. 357] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 358]

SUPREME COURT OF THE UNITED STATES

No. 724, October Term, 1958

CARL C. INMAN, Petitioner,

vs.

BALTIMORE & OHIO RAILROAD CO.

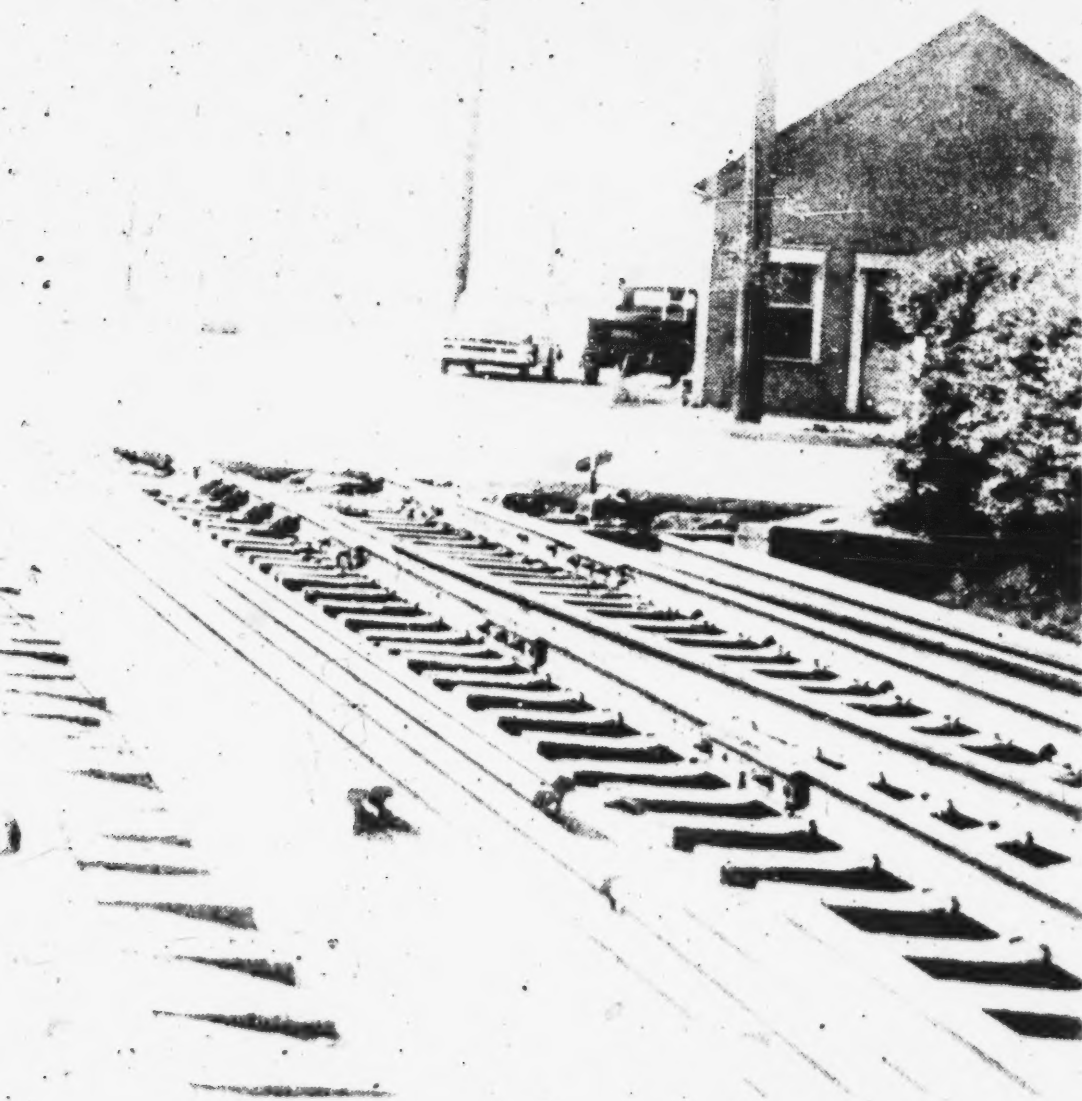
ORDER ALLOWING CERTIORARI—April 6, 1959

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



PLAINTIFF'S EXHIBIT 2



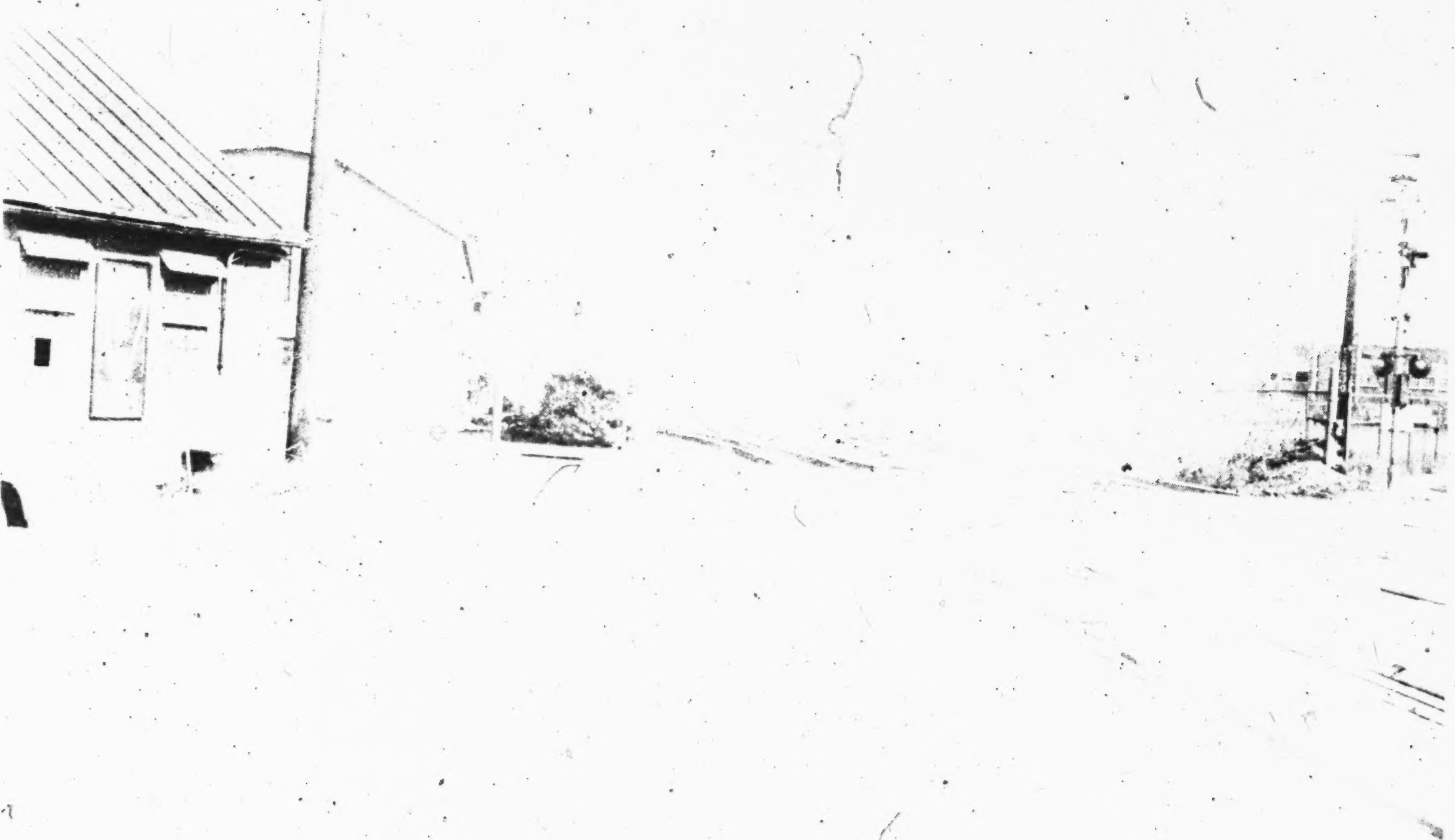
EX 2



MAIN LIFE'S EXHIBIT 3

[fol. 288]

PLAINTIFF'S EXHIBIT 5



A

B



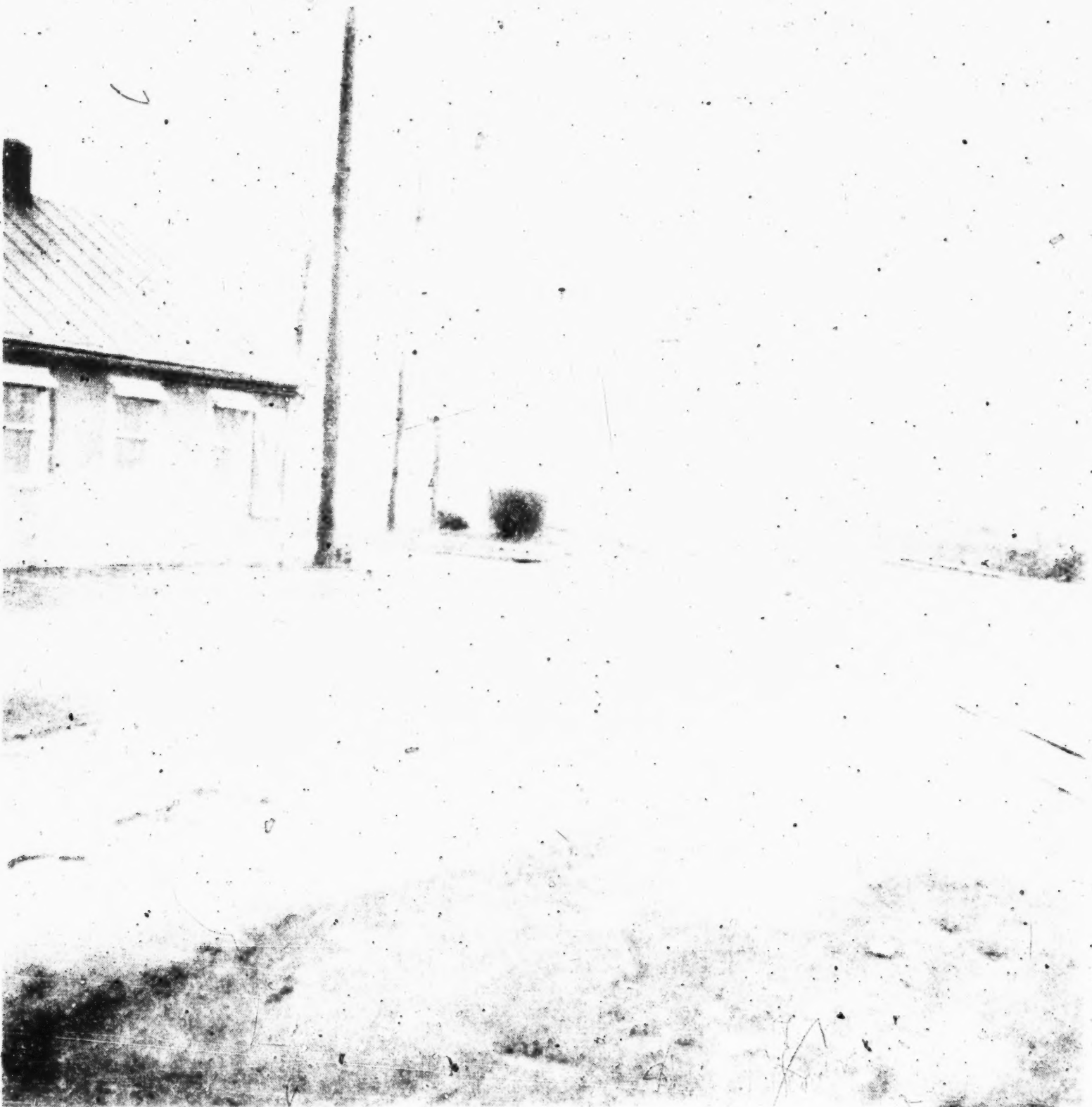
PLAINTIFF'S EXHIBIT 7



Ex 7

[fol. 290]

PLAINTIFF'S EXHIBIT 11



EX 11

Rev. 7-30-41

Form 1562B-8-51

The Baltimore and Ohio Railroad Company

a
 Accident to Carl Inman at Akron, Ohio Date 1/2/52
 Statement of Carl Inman Married Single Occupation Crossing Watchman
 Age 67 Years. Residence 261 Spruce St Akron, Ohio
 Made to Dr. James Spinelli on the 22nd day of February 1952
 At City Hospital - Akron, Ohio Address

In the presence of

I have been in the service of the Baltimore & Ohio R.R. for about 80 years. I have been a crossing watchman 18 years. On January 2, 1952 at about 12:10 P.M. which time the weather was clear and dark. I was on duty as crossing watchman working at Bell's Corner at Akron, Ohio when I was struck by a hit and skip dumper. At time of accident I was standing at the center of Talmadge and just clear of the west bound track. I was protecting traffic having a red lantern & green lantern in each hand for a east bound train. When this east bound train was nearing the end and when the caboose was about across from me or about in the center of Talmadge Ave. something struck me from the right rear of me throwing me forward landing in the center of the west bound track and in the line of the automobile before you east. I was rendered unconscious for a couple of minutes and the person in car was not quite. I do not know where he went after the accident. There were auto's that I noticed when the train was by on the west side of Talmadge and on the south side of Home Ave. I am certain that the caboose had not clear the crossing at time I was struck. This crossing was well lighted and was a T crossing.

(OVER)

Pls. Ex 14
~~Pls. Ex 14~~

in the range of one of the city, is located on the south west corner of the crossing. I do not know where the auto came from but I know me, I later learned that it was from Home Ave. - was just taking it from the later removed (1-15-52) to the hospital. The crossing was in good condition and there were no vehicles or other persons. I had not moved from my original position of standing. Although I was looking north to the south when struck by make some time in the morning on the West road, I was looking in my left hand and I was looking in my right and back hand.

Have you read this statement? Yes

Is it true and correct? Yes

Carl C. O'Connor

Witness - 9 James Spence

[fol. 293]

DEFENDANT'S EXHIBIT A

Rev. 1-10-50.

21-22-50

Form 1500-2-50

The Baltimore and Ohio Railroad Company

Accident to Carl Inman at Akron, O. Date 1/2/52
 Statement of Sam H Bailey ^{Married} ~~Single~~ Occupation Munroe Falls Ohio Co
 Age 37 Years. Residence Box 33 Munroe Falls, O. ME 3178
 Made to James G. Guelch on the 3rd day of January 1952
 At His mother's home 1600 Bridgeway Ave. Akron, O.
 Address

In the presence of

On January 2, 1952 at about 12:30 A.M. at which time the weather was dark & cloudy I witnessed an accident to a B & O crossing watchman that was struck by an automobile at Home & Tallmadge crossing. At the time of this occurrence. At time of this accident I was in the automobile that was first in line of traffic headed East on Tallmadge Ave. After the caboose of the Northbound train passed, the crossing watchman began to walk towards his shanty walking in a south easterly direction but was struck by this Plymouth Sedan when he ~~was~~ ^{was} on the punny track and near the curb line although I do not think there is a walk over the crossing. The Plymouth pulled out of a line of traffic on Home Ave. and made a sharp left turn onto Tallmadge Ave. headed West. The crossing watchman had his back to Home Ave traffic and had signalled Tallmadge traffic ahead. I began to move but noticed this auto pull out of his line of traffic and made a sharp left hand turn, striking the watchman on the left side throwing him to the north edge of the crossing and about where the south bound track would be. At the time the crossing watchman was flagging and while the train was moving over the crossing he was standing at about the center of the crossing.

(OVER)

Jett's Exh A

and on the south bound track, that is between the
rails of that track. He had a green lantern in his
left hand and a red lantern in his right hand. He
had his back towards home due traffic when struck.
I do not think the crossing watchman knew where
the auto came from. I had to make a quick stop
at the Durv. may have damaged the front of my
auto. I was driving a 1940 Chrysler coupe. The
front of the Plymouth involved in this accident had
his head lights lit at the time of accident. The
flashes were properly operating at time the train
was going over the crossing. There is no reason
why the Durv could not see the watchman for
besides the 2 lanterns in his hands and my
headlights were focused on the watchman. I
managed to secure the license number of the auto
involved and turned it over to the police. When I
went to the crossing watchman after the accident
I noticed that he was in a crouching position
forming the ground on his stomach and holding
his head. I could not see his left leg
was broken. The arrival was about 10 to 15 minutes.
The crossing watchman was in no way at fault
for this accident. The caboose was about 150 feet
clear of the crossing when accident took place.
Have you read my statement? - yes
Is it true & correct? - yes

Sam H. Bunker

Witness: 9 James A. Smith

THE BALTIMORE AND OHIO RAILROAD COMPANY

CONDUCTOR'S REPORT OF FREIGHT TRAIN

Engine No. PIKER From WILLARD OHIO Date 1-52-19CF 4:30PM 5:50 G.M.

Class SHEET ONE To NEWCASTLE PA Date 1-2-1952 Time 11:25 A.M.

Conductor Green From 715 To 568

Conductor Green From 568 To 158

ENGINE No.	FROM	TO	WEIGHT IN TONS	TIME OF ARRIVAL AND DEPARTURE FROM STATIONS AT WHICH GONS ARE TAKEN OR LEFT						No. of Gons	No. of Empty	Total Gons
				Station	Arrived	Left	Station	Arrived	Left			
4414	715	568	4603 A		M			M				
4414	568	158			M			M				
4414	158				M			M				
4414					M			M				

No. of Cars	Label	Loaded Car No.	Empty Car No. or Quantity of Loaded Car	Label	Where Taken	Where Left	Date Arrived	Final Destination	Weight in Tons	
									Time	Net
	CARBOONS	2018	CREW	C	715	568 1/2		NEWCASTLE PA		
1	LN	81495	COAL	H	715	667 1/2		LORAIN O	20	55
	LN	79454	COAL	H	715			"	20	56
2	LN	62385	COAL	H	715			"	20	55
	LN	75465	COAL	H	715			"	19	47
3	LN	66132	COAL	H	715			"	19	60
	LN	75125	COAL	H	715			"	20	52
4	LN	80767	:9-) COAL	H	715			"	20	56
	LN	31046	COAL	H	715			"	20	56
5	LN	59963	COAL	H	715			"	21	53
	LN	56543	COAL	H	715			"	21	53
6	LN	68789	COAL	H	715			"	20	61
	PLE	66382	COAL	H	715			"	23	67
7	NYC	918969	COAL	H	715			"	23	67
	LN	32768	COAL	H	715			"	20	56
8	EBALANCE OF TRAIN CONSIST OF 80 EMPTY GONS FOR BALTIMORE MD WHEELED BY HAND									
9	END OF SHEET ONE FIANL END OF PIKER CF 430PM									
10										
11										

4	LN	31046	COAL	H	715			"	20	56
5	LN	59963	COAL	H	715			"	21	53
	LN	56543	COAL	H	715			"	21	53
6	LN	68789	COAL	H	715			"	20	61
	PLE	66382	COAL	H	715			"	23	67
7	NYC	918969	COAL	H	715			"	23	67
	LN	32768	COAL	H	715			"	20	56
8	EBALANCE OF TRAIN CONSIST OF 80 EMPTY GONS FOR BALTIMORE MD WHEELED BY HAND									
9	END OF SHEET ONE FIANL END OF PIKER CF 430PM									
10										
11										
12										
13										
14										
15										
16										
17										
18										
19										
20										
21										

Def'ts Exh. D-1

In the absence of light weight on waybills or stencilled light weight on cars, average light weights shown below will be used on wheel reports when booking Baltimore and Ohio equipment.

- ↑ Includes L. C. L. Merchandise containers
- Includes nine Dolomite containers.
- Includes twelve Dolomite containers.

- ▲ (Cement)—four Sliding hopper doors.
- ◆ Equipped with Evans Auto Loaders.
- ◆ Includes Evans Auto Loaders.

THE BALTIMORE AND OHIO RAILROAD COMPANY

CONDUCTOR'S REPORT OF FREIGHT TRAIN

Sec. Train No. 568 From Williamsport Date 1-15-1918 Time 5:50 P
Class Coal To C. Williamsport Date 1-15-1918 Time 11:56 A
Conductor W. J. Williams From Williamsport To Williamsport
Conductor W. J. Williams From Williamsport To Williamsport

No. of Cars	Initial	Engine No.	FROM	TO	Rating in Tons	TIME OF ARRIVAL AND DEPARTURE FROM STATIONS AT WHICH CARS ARE TAKEN ON OR LEFT					Final Destination	Weight in Tons	
						Station	Arrived	Left	Station	Arrived		Tons	Net
1	238					Williamsport	11:56 A		Williamsport	11:56 A	Williamsport		
2						Williamsport			Williamsport		Williamsport		
3	238					Williamsport			Williamsport		Williamsport		
4						Williamsport			Williamsport		Williamsport		
5	238					Williamsport			Williamsport		Williamsport		
6	238					Williamsport			Williamsport		Williamsport		
7						Williamsport			Williamsport		Williamsport		
8						Williamsport			Williamsport		Williamsport		
9						Williamsport			Williamsport		Williamsport		
10						Williamsport			Williamsport		Williamsport		
11						Williamsport			Williamsport		Williamsport		
5	238					Williamsport			Williamsport		Williamsport		
6	238					Williamsport			Williamsport		Williamsport		
7						Williamsport			Williamsport		Williamsport		
8						Williamsport			Williamsport		Williamsport		
9						Williamsport			Williamsport		Williamsport		
10						Williamsport			Williamsport		Williamsport		
11						Williamsport			Williamsport		Williamsport		
12						Williamsport			Williamsport		Williamsport		
13						Williamsport			Williamsport		Williamsport		
14						Williamsport			Williamsport		Williamsport		
15	238					Williamsport			Williamsport		Williamsport		
16						Williamsport			Williamsport		Williamsport		
17						Williamsport			Williamsport		Williamsport		
18						Williamsport			Williamsport		Williamsport		
19						Williamsport			Williamsport		Williamsport		
20						Williamsport			Williamsport		Williamsport		
21						Williamsport			Williamsport		Williamsport		

Def. Ex. D-2

AVERAGE LIGHT WEIGHTS OF BALTIMORE AND OHIO FREIGHT CARS.

In the absence of light weight on waybills or stencilled light weight on cars, average light weights shown below will be used on wheel reports when booking Baltimore and Ohio equipment.

SERIES INDEX	KIND OF CAR	SERIES	AVERAGE LIGHT WEIGHT (TONS)	SERIES INDEX	KIND OF CAR	SERIES	AVERAGE LIGHT WEIGHT (TONS)
9	Flat Flat Flat	9000 to 9033 9043, 9044 9900 to 9904	16 16 33				
10	Stock Stock	10700 to 10749 10800 to 10999	20 21				
20	Hopper Hopper Hopper Hopper Hopper Hopper	20000 to 20041 20500 to 20799 21000 to 22024 24024 to 24958 25000 26001 27000 29000	20 19 21 22 22 22 20 21				
30	Hopper Coke-Gondola Coke-Gondola	30000 to 31024 32019 to 32022 32054 to 32058 32060 to 32083	20 22 22 22				
70	Box	79000 to 79015	22				
80	Box Box Box Box	80000 to 80027 80028 to 80063 80500 to 80548 81002 to 82999 83002 to 86498	23 23 27 21 21				
100	Flat Flat Flat Flat	106002 to 106699 107002 to 107499 108000 to 108498 109000 to 109189 109900 to 109964	20 20 20 20 19				
110	Stock Stock Stock Stock	110001 to 110592 111000 to 111099 112000 to 112124 112125 to 112495 112496 to 112495 112500 to 112599	19 19 20 19 19 18				
120	Hopper Hopper Hopper	124300 to 124998 125001 to 126998 127040 to 129999	22 22 22				
130	Hopper Hopper Hopper Gondola	130010 to 130011 132006 to 133990 134001 to 134998 135009 to 135974 136308 to 138975	22 25 26 25 23				
150	Gondola	151000 to 151495	23				
160	Box Box Automobile Automobile	165097 to 165917 166000 to 166024 166100 to 166322	23 29 26				
170	Box Box Box Box Box Box Box Box Box	173001 to 173998 174000 to 174497 174500 to 174999 175000 to 175999 176000 to 177999 178000 to 178499 178542 178991 to 178999 179225 to 179249	22 23 23 22 22 22 18 22 22				
180	Box Box Box Box Box Box Box Box Box	180565, 180686 182184 to 182989 183700 to 183703 184000 to 184998 186731, 186984 186999 187000 to 187499 188014 to 188408 188516 to 188772 189038 189553, 189590 189725	22 23 22 21 23 23 23 21 21 20 20 22				
190	Box Box	190043, 190186 191689, 192834 195565	23 21 19				
220	Hopper Hopper Hopper Hopper Hopper Hopper Hopper	222010 to 220489 220525 to 220986 221004 to 221498 221579 to 221993 222005 to 222999 223000 to 223409 225500 to 225799 229000 to 229999	19 18 18 18 21 18 21 21				
230	Hopper Hopper Hopper Hopper Hopper	230000 to 232999 233100 to 233496 233500 to 233699 233803 to 234131 234212 to 234243 234708 to 234864 235000 to 235999	21 21 21 20 18 19 20				
240	Gondola Gondola	240400 to 240602 241259, 241748 249000	21 20 27				
250	Gondola Gondola Gondola Gondola Gondola Gondola Gondola Gondola	250000 to 250499 250500 to 256499 256508 to 256548 256600 to 256631 256632 to 256646 256670 to 256741 256750 to 256899 257000 to 258799 259000 to 259999	25 25 134 339 342 348 27 27 27				

↑ Includes L. C. L. Merchandise containers.
 * Includes nine Docket 2041.

Includes nine Durable containers.

- Includes twelve DoloMite containers.

Δ (Cement)—four sliding hopperdoors.

• Equipped With Evans Auto Loaders.

• Includes Evans Auto Loaders.

				400	400	20000 to 20000		
				520	Hopper	520000 to 527292	22	
220	Hopper Hopper Hopper Hopper Hopper Hopper Hopper	22010 to 220489 220525 to 220986 221004 to 221498 221579 to 221993 222005 to 222999 223000 to 225409 225500 to 225799 229000 to 229999	19 18 18 18 21 18 21 21	530	Hopper Hopper Gondola	532000 to 533999 534000 to 534999 536000, 536001	27 20 22	
				620	Hopper Hopper	620000 620500	29 23	
230	Hopper Hopper Hopper Hopper Hopper Hopper	230000 to 233999 233100 to 233499 233500 to 233699 233803 to 234131 234212 to 234243 234708 to 234964 235000 to 235999	21 21 21 20 18 19 20	630	Hopper Hopper Hopper Hopper Hopper Hopper Hopper	630000 to 630024 630025 to 630074 630104 to 630177 630200 630300 to 630499 630500 to 630649 630650 to 630999 6310,00 632000 633000 633001 to 633003 634000 635000 to 635035 636000 to 639999	22 23 21 18 25 25 26 14 16 16 17 18 18 20	
240	Gondola Gondola	240400 to 240602 241259 241748 246000	21 20 27		Hopper Hopper Hopper Hopper Hopper Hopper Hopper	640000 to 640999 720004 to 725396 726000 to 726798 830000 to 834999	20 19 21 21	
250	Gondola Gondola Gondola Gondola Gondola Gondola Gondola	250000 to 250499 250500 to 256499 256508 to 256548 256609 to 256631 256632 to 256646 256700 to 256741 256750 to 256999 257000 to 258799 259000 to 259999	25 25 134 39 42 48 42 27 27	640	Hopper	640000 to 640999	20	
				720	Hopper Hopper	720004 to 725396 726000 to 726798	19 21	
				820	Hopper	830000 to 834999	21	

† Includes L. C. L. Merchandise containers.
‡ Includes nine Dolomite containers.
§ Includes twelve Dolomite containers.

△ (Cement)—four sliding hoppers, doors.
• Equipped with Evans Auto Loaders.
• Includes Evans Auto Loaders.

AVERAGE NET WEIGHTS TO BE USED ON WHEEL REPORTS FOR ALL UNWEIGHED COAL, COKE AND CEMENT

Series	Capacity	Coal	Coke	Cement
100,000 pounds.....	56 tons.....	30 tons.....	56 tons—Hoppers 29 tons—Box	
110,000 pounds.....	56 tons.....	32 tons.....	60 tons	
140,000 pounds.....	76 tons—Hoppers..... 45 tons—Gondolas.....	42 tons.....	72 tons	
B. & O. Hoppers Series 427000 to 427999	100,000 pounds.....	58 tons.....	32 tons.....	

INSTRUCTIONS

- Information for columns Nos. 1 to 7, inclusive, must not be dittoed, but must be written out in full for each car.**
Do not detach Parts 1 and 2, as they will be separated in the Superintendent Car Service office. Part 1 being cut up for record purposes, it is necessary that care should be taken to see that initials and numbers do not extend above or below the horizontal lines shown. Column No. 7 headed "Date Arrived," should show date car arrived at the various stations, regardless of the date car moved from terminals or was picked up en route. Caboose number to be reported for each train handled.
- When it is necessary to use more than one set of sheets, fill out the heading of each sheet as heretofore.
- Report in "Engine" column the Helping Engine's number, stating where taken and where left.
- Round Trips must not be reported on one blank. Make report for light trips. Fill out back of reports.
- When empty cars are hauled, which are regularly billed as freight, mark them "Billed" in the "Destination" column.
- Use station numbers or symbols in columns "Where Taken" and "Left."
- The Seal Record will be omitted from Conductor's Report, but the seals on cars must be examined as frequently as possible by Trainmen, and a record of any defective seal made in Conductor's Book and on back of this blank.
- The Conductor will put a circle around the marginal number opposite any car damaged by accident or rough handling, if defects are discovered en route, or when moved from an outlying point to a repair point.
- Column headed "Kind" use following symbols to designate the class of freight cars:
A—Automobile; AR—Automobile Rack; B—Box; V—Box Vent; G—Open Top Gondola; CG—Open Top Gondola, Mill Type; H—Open Top Hopper; CH—Hopper, Covered; CK—Coke Rack; CN—Container; F—Flat; LP—Live Poultry; R—Refrigerator (Freight); RE—Refrigerator (Passenger); SD—Stock Single Deck; DD—Stock Double Deck; PH—Palace Horse; T—Tank.
- When running as extra for Schedule train, give the train number at top of report.
- Show in column headed "Rating" adjusted rating engine is expected to handle.
- For all cars billed "Stop Off" en route, show in column marked "Final Destination" the "Stop Off" point. On all other cars show "Final Destination."

Received this report at

Station

at M

19

to be forwarded on train No.

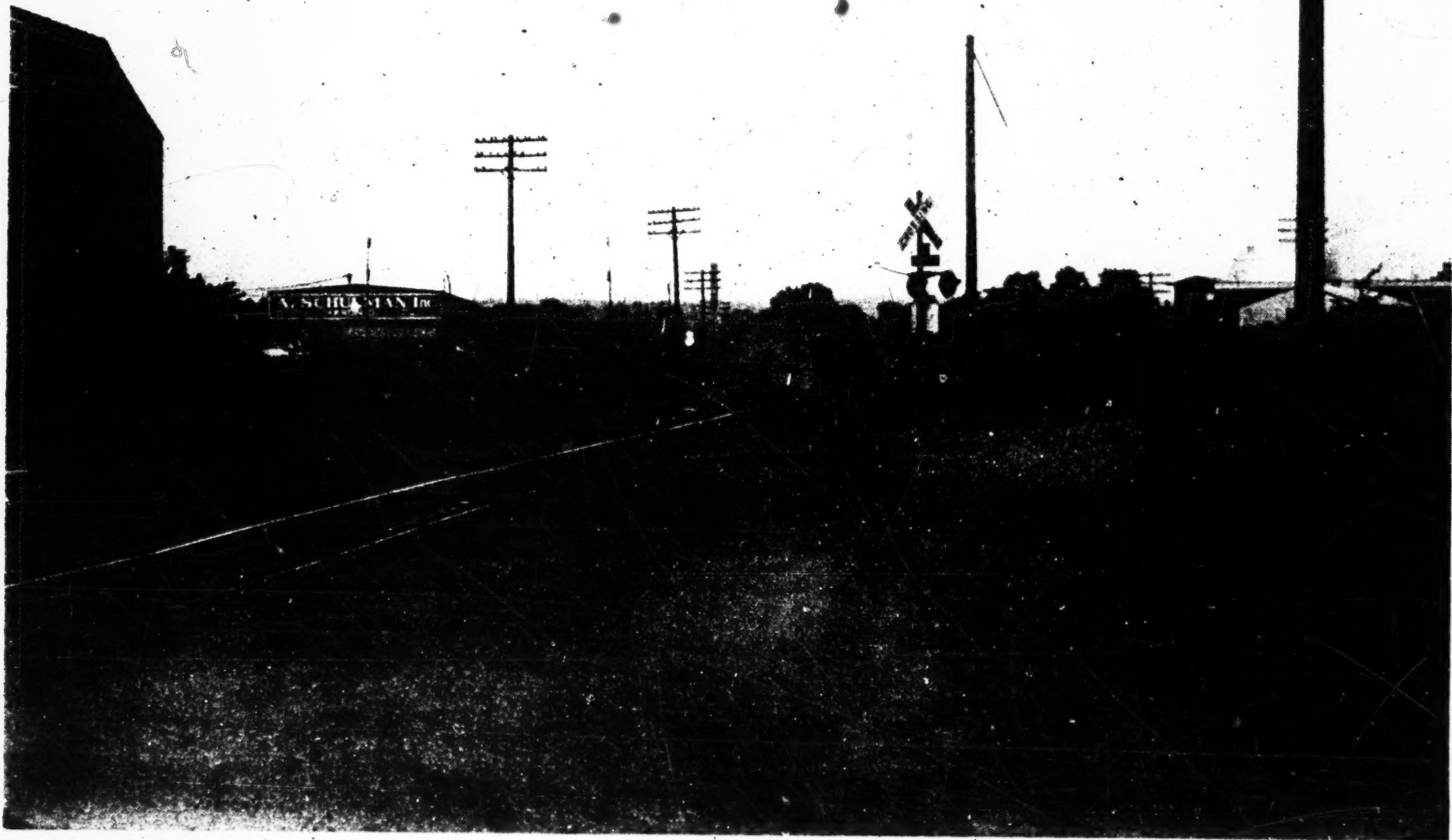
M

M

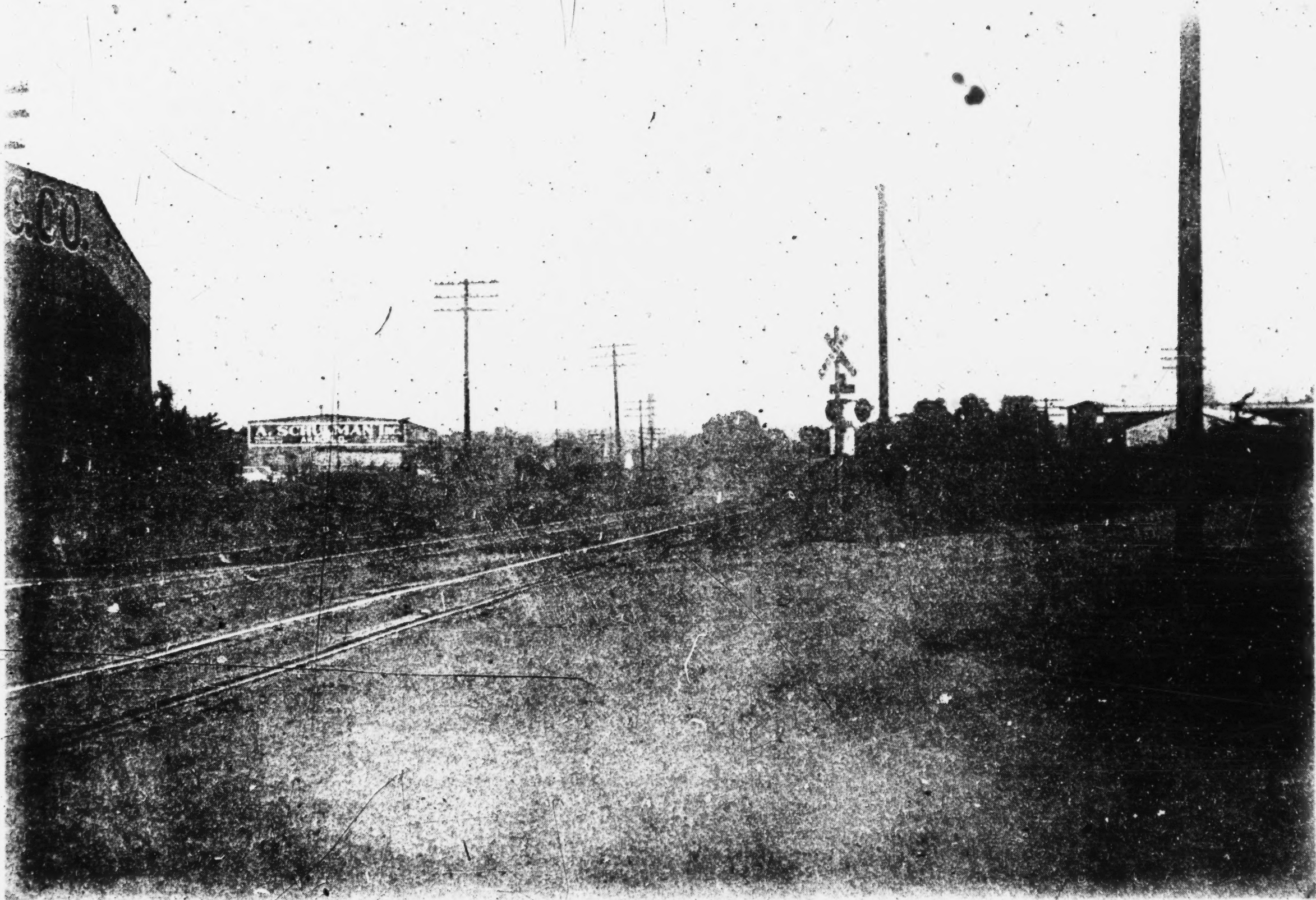
19

Agent or Y. M.

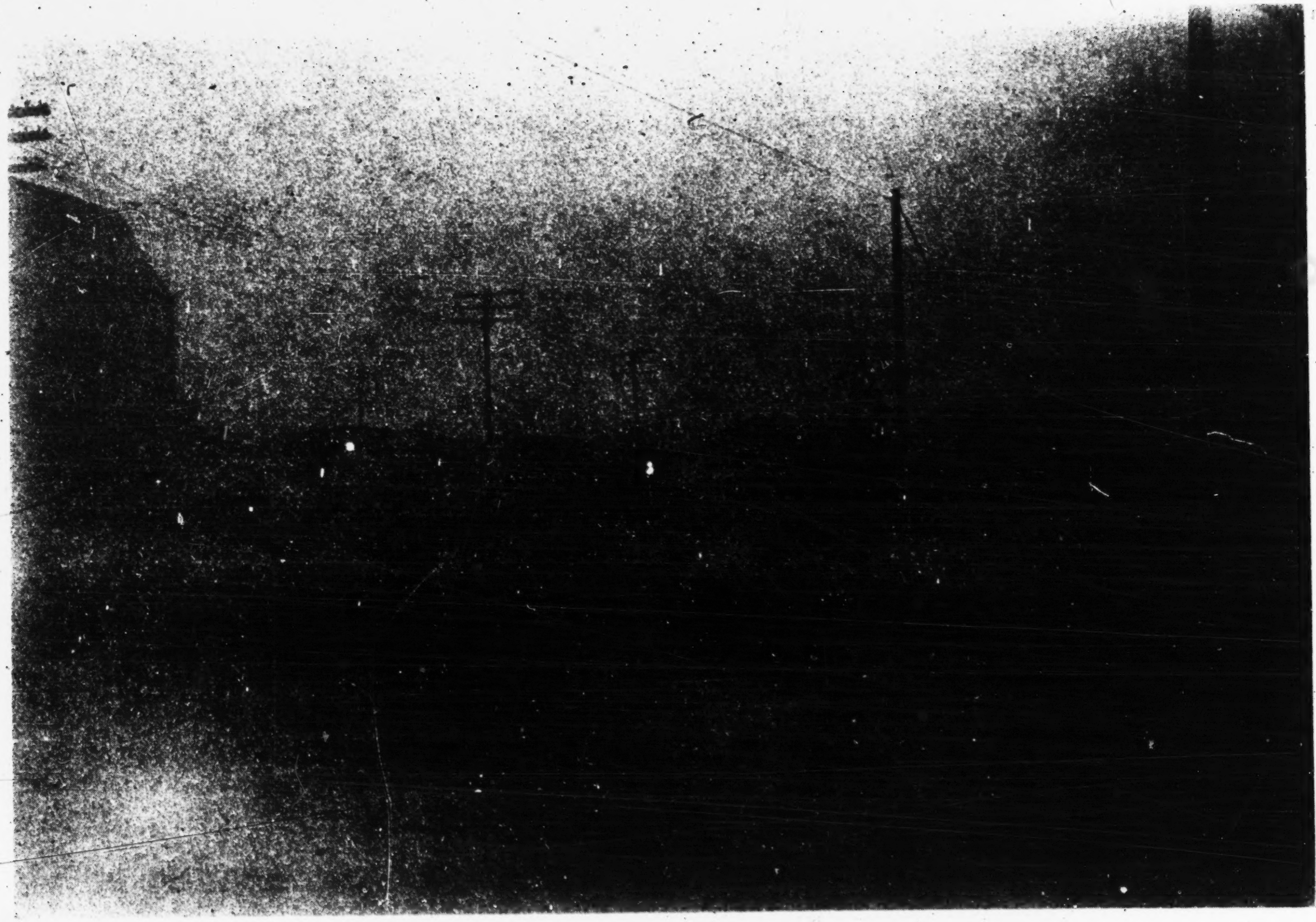




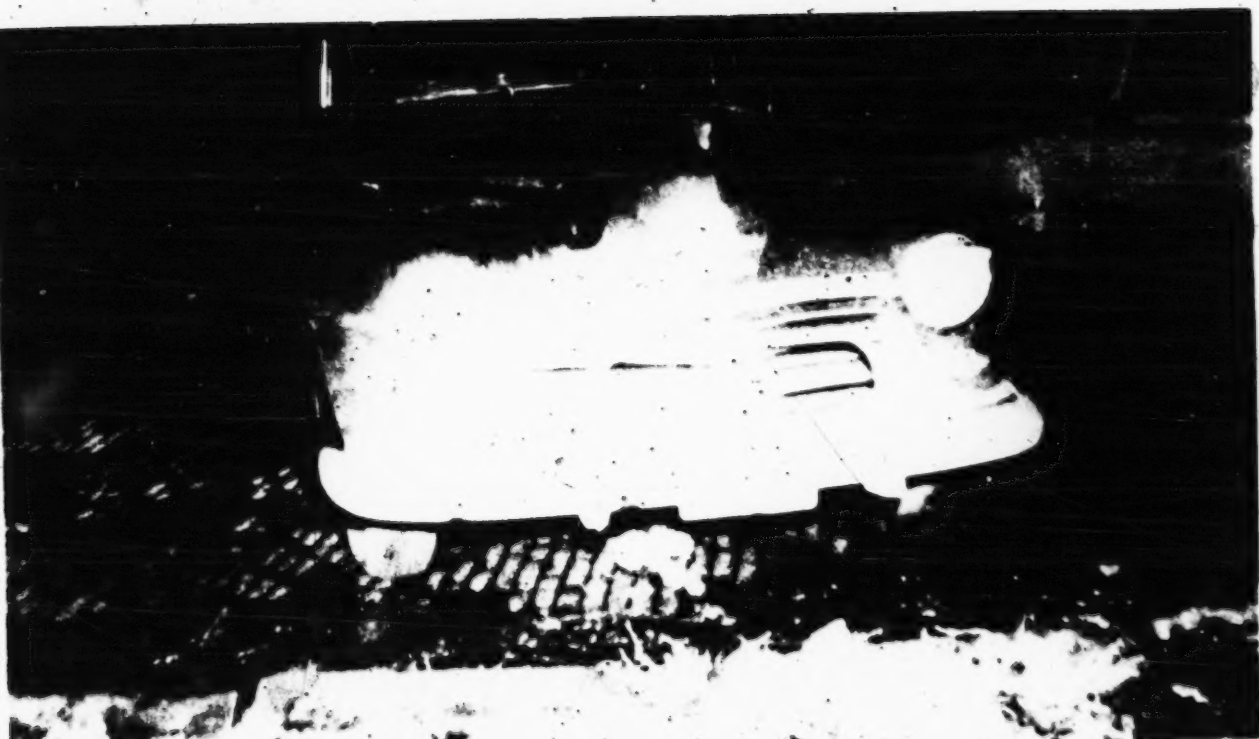




DEPENDANT'S EXHIBIT II







Ex 17

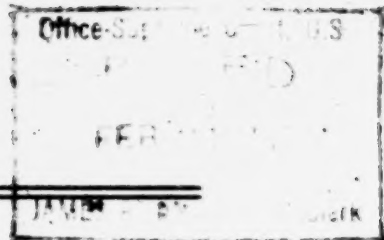


Ex 18



Prepared from records of THE CITY OF AKRON, HIGHWAY
DIVISION.

Frank L. Beckman
REG CIVIL ENGINEER No 9708



In the Supreme Court of the United States

No. ~~136~~ 136

OCTOBER TERM, 1958

CARL C. INMAN,
Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Ohio.

RAYMOND J. MCGOWAN,
603 Second National Building,
Akron, Ohio,
Attorney for Petitioner.

CHARLES F. SCANLON,
603 Second National Building,
Akron, Ohio,
Of Counsel

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<i>Gibson v. Thompson</i> , 355 U. S. 18	16
<i>Honeycutt v. Wabash R. Co.</i> , 355 U. S. 424	16
<i>Lavender v. Kurn</i> , 327 U. S. 645	8
<i>Lillie v. Thompson</i> , 332 U. S. 459	14
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In the Supreme Court of the United States

No.

OCTOBER TERM, 1958.

CARL C. INMAN,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio.

Carl C. Inman, Petitioner, prays that a writ of certiorari issue to review a final judgment of the Supreme Court of Ohio entered in the above entitled case on November 12, 1958, and its refusal to reconsider entered on December 3, 1958.

OPINIONS BELOW.

The Journal Entry of judgment of the Court of Common Pleas is unreported and appears in the transcript of the record. The opinion of the Court of Appeals of Summit County, Ohio, is unreported and appears in the Appendix, page 17, *infra*. The decision of the Supreme Court of Ohio dismissing petitioner's appeal "filed as of right herein" for the reason that "no debatable constitutional question is involved," is reported in 168 O. S. 335, and is printed in the Appendix, page 31, *infra*. The decision of the Supreme Court of Ohio overruling the motion of

petitioner for an order directing the Court of Appeals of Summit County, Ohio, to certify its record appears in 31 Ohio Bar No. 44, and is printed in the Appendix, page 31, *infra*. The decision of the Supreme Court of Ohio denying the application for rehearing appears in 31 Ohio Bar, No. 47, and is printed in the Appendix, page 32, *infra*.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on November 12, 1958, and its denial of rehearing was rendered on December 3, 1958.

Jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Sec. 1257 (3).

QUESTIONS PRESENTED.

1. Did the Court of Appeals of the State of Ohio err in holding as a matter of law that the evidence adduced does not show any negligence of respondent, and does not permit the inference, or authorize the jury to infer, that the respondent was negligent as charged and submitted?

2. In an action under the Federal Employer's Liability Act, 45 U. S. C. 51 *et seq.*, where the employer sent an employee as a crossing watchman, in the night season, to stand directly in the intersection of two heavily traveled highways, immediately west of its railroad tracks, which crossed both highways diagonally at the intersection, and the employee's duties required him to face the train, with his back to traffic, as the train was passing over the crossing, thus creating a likelihood that the employee might be struck by a vehicle of a third party, which in fact occurred, can the state court say as a matter of law that there was no actionable negligence?

3. In an action under the Federal Employer's Liability Act, can it be said that where the employee is struck by an automobile driven by a third party, that defendant must be exculpated, as a matter of law, because the automobile driver violated traffic statutes or ordinances?

4. Has the State Court of Appeals properly read into the Federal Employer's Liability Act, a requirement that where the injuries resulted "in part" from the employer's negligence, in addition thereto such negligence must be a proximate cause of the injury, in the common law legal sense before liability attaches?

STATUTES INVOLVED.

The Federal Employers' Liability Act:

"Every common carrier by railroad while engaging in commerce between any of the several states or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

Judicial Code:

"§ 1257. State Courts; Appeal; Certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257.

STATEMENT OF THE CASE.

This action was brought in the Common Pleas Court of Summit County, Ohio, under the Federal Employers' Liability Act, 45 U. S. C. 51, *et seq.*, against The Baltimore & Ohio Railroad Company, to recover damages for injuries sustained through the negligence of the railroad in assigning petitioner, an employee, as a crossing flagman under evidence showing that his place of work, and respondents method of work were unsafe, and dangerous, where he was struck by the automobile of a third person, the employer being aware of conditions which created a likelihood that the employee would be struck by a motor vehicle just as in fact occurred.

Tallmadge Avenue (State Route 18) a main traffic artery extends east and west in the City of Akron, Ohio, and is intersected on an angle by Home Avenue, a street extending in a northeasterly and southwesterly direction. Respondent operates a 3 track line diagonally across the intersection of both streets. Home Avenue intersects Tallmadge Avenue along the westerly tracks of the respondent so that traffic approaching from the southwest on Home Avenue is able to make a left hand turn into Tallmadge Avenue. A little after midnight on January 2, 1957, a freight train of the defendant was approaching the crossing, traveling in a northwesterly direction, and in the performance of his duties, petitioner, stationed himself directly, in the intersection of Tallmadge Avenue and Home Avenue, 3 or 4 feet west of the tracks.

• He flagged motor traffic moving in all four (4) directions to a stop until the train reached the crossing (R. 7) This ended petitioners duty to stop the traffic and he then had to and did face the train to look for hot boxes (R. 172) and to look for trains approaching from the opposite direc-

tion (R. 8). While in this position he had his back to traffic on both highways west of the tracks (R. 10) and just as the caboose reached the crossing, petitioner began to turn and face traffic west of the tracks, to get the traffic moving (R. 10) when an automobile on Home Avenue "jumped the gun" and without any signal or warning started up and made a left hand turn into Tallmadge Avenue (R. 71) before petitioner had a chance to face traffic and signal the vehicles forward (R. 10).

The railroad was or should have been aware of conditions which created a likelihood that the employee would be struck by a motor vehicle (R. 71) just as in fact occurred.

The jury was carefully instructed, that if petitioner's injury resulted solely from the negligence of James Ball, the operator of the automobile which struck him, the verdict should be for respondent (R. 315).

The jury was properly instructed upon the issue of respondent's negligence, and its effect if it had any part in producing petitioner's injury (R. 306).

The jury was further carefully instructed as to its verdict if it should find that petitioner's injury resulted from his own acts and conduct (R. 311).

The jury was further carefully instructed as to the effect of the combined and concurrent negligence of both petitioner and respondent as causative factors in petitioner's injury (R. 315-316).

The jury returned a general verdict in favor of petitioner for \$25,000.00, upon which judgment was entered.

The jury also answered two interrogatories submitted to them as follows:

No. 1. Do you find that the defendant was negligent? Answer: "In Part."

No. 2. If your answer to question No. 1 is in the affirmative, state of what said negligence consisted. Answer: "Not providing enough protection." (R. 323.)

Upon appeal, the Court of Appeals for Summit County, Ohio, reversed the judgment and rendered final judgment for respondent. The Supreme Court of Ohio, refused petitioner's motion to Certify the Record and denied rehearing.

REASONS FOR GRANTING THE WRIT.

1(a) The decision herein is not in accord with the applicable decisions of this Court.

I.

The State Court of Appeals, by its decision and judgment in this case, denied petitioner a right specially set up and claimed by him under the Federal Employer's Liability Act, namely, the right to have this case submitted to a jury for the determination of whether his injury resulted "in whole or in part" from negligence of the respondent.

Bailey v. Central Vermont R. Co., 319 U. S. 350;

Schultz v. Pennsylvania R. Co., 350 U. S. 523;

Tennant v. Peoria & P. U. R. Co., 321 U. S. 29;

Moore v. Terminal R. Assn. of St. Louis, 79 S. Ct. 2;

Rogers v. Missouri Pacific R. Co., 352 U. S. 500.

II.

The State Court of Appeals, in holding that there was "no duty imposed on defendant to anticipate such an occurrence as eventuated" and "no negligence for failure to guard against it" has decided Federal questions of sub-

stance in a way not in accord with the applicable and controlling decisions of this Court in that:

(A) The State Court of Appeals, in holding as a matter of law that respondent was not negligent, failed to give petitioner the benefit of all the facts and circumstances in evidence in his favor, and all the inferences of fact which may reasonably be drawn from the evidence favorable to him.

Webb v. Illinois Central R. Co., 352 U. S. 512.

Wilkerson v. McCarthy, 336 U. S. 53.

Lavender v. Kurn, 327 U. S. 645.

(B) The State Court of Appeals determined the question of respondent's negligence, not from the facts and inferences as a whole in their interwoven relationship where each imparts character to the others, but from only a part of the facts and circumstances, with even those in that part separated and considered apart from each other.

Union Pacific R. Co. v. Hadley, 246 U. S. 330, 332.

Blair v. Baltimore & O. R. Co., 323 U. S. 600, 604.

(C) The State Court of Appeals also erroneously determined the issue of causation of petitioner's injury by its own independent resolution of the facts and circumstances in evidence, and a reweighing of the evidence and the inferences to be deduced therefrom.

Rogers v. Missouri Pacific R. Co., *supra*, 352 U. S. 500.

Stinson v. Atlantic Coast Line R. Co., 355 U. S. 62.

1(b) The action of the State Court constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

The Court below in deciding "that the plaintiff, while in the discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, was not, in our opinion, such an occurrence as, under the evidence of this record, was reasonably foreseeable by defendant" constitutes a clear invasion of the jury's province, overlooking the decisions of this Court to the effect that under the Federal Employer's Liability Act, *supra*, the jury's power to draw inferences is greater than at common law.

Rogers v. Missouri Pacific R. Co., *supra*, 352 U. S. 500;

Moore v. Terminal R. Assn. of St. Louis, *supra*, 79 S. Ct. 2.

The deprivation of a constitutional right by the violation of this fundamental rule has many times been made the basis for granting writs of certiorari by this Court. Therefore, it is respectfully submitted that the Court below, by substituting its view of the case for that of the jury invaded the province of the jury, contrary to the rights of petitioner under the 7th Amendment to the Constitution of the United States.

2. Argument amplifying the reasons for allowance of the writ.

The State Court of Appeals overlooked certain material facts established by the evidence in proceeding on the theory "there is further no evidence of prior occurrences of the kind here under consideration, which would

put the defendant on notice of likelihood of injuries to one in the position of plaintiff."

Sam Bailey, a witness to the accident, was well aware of the disregard for signals on the part of vehicular drivers and of their habit of "jumping the gun" at this intersection. He testified (R. 71):

"A. I had stopped for the train and the train was just about to clear the crossing, I believe the cab was coming over the crossing at the time. *This car, like a lot of them I seen there, jumping the gun,* seen the tail end of the train coming up went around the cars, this car came around several cars that was on Home Avenue and turned west on Tallmadge Avenue and hit the watchman."

The defendant could foresee the possibility that a driver of a motor vehicle would disregard the crossing signals, "jump the gun" and make a left hand turn from Home Avenue to Tallmadge Avenue. Other drivers had previously done so.

The overlooking of the material facts above mentioned, leads to a nullification of the effect of the controlling line of Supreme Court decisions.

Raymond B. Peterson, the conductor on the train and a witness for the defendant, was well aware that petitioner's duties required him to face the train with his back to traffic, while the train was passing the intersection. He testified (R. 172):

"Q. You say it was the watchman's duty to keep watching your train as it went by to see if there were any hot boxes or anything wrong with your train and if there was he'd give you a signal? That's customary? A. That's customary, other duties permitting he is generally required to do that.

Q. He had watched trains you had been on? (R. 172.) A. Yes, sir.

Q. And if he saw something wrong he'd give you a signal? A. That's right." (R. 172.)

Petitioner testified (R. 7):

"Q. Any reason you went west of the west bound tracks? A. That was instructions, an eastbound train, a train going east the flagman should be on the west side of it so he can see if there's anything coming on the westbound.

Q. Who gave you those instructions? A. For one, Mr. Gamble, when he was instructing me about flagging up there because I had never done any flagging on the railroad.

Q. What was Mr. Gamble's capacity with the railroad? A. Crossing watchman.

Q. And what did you do when you got to the center of Tallmadge Avenue? A. By the time I got there the train was almost close enough—I had to look at traffic all four ways, if there was room I let two or three cars go through, if there wasn't I blew my whistle, turned my lantern so each one could see it, this shield on it, it's a fourteen inch shield. (R. 8.)

Q. Which way did you face then after the train started to pull across the crossing? A. After the crossing was blocked you have reference to? (R. 8.)

Q. Yes. A. I looked at the train. I looked away, that time, until I could see where the caboose was, then I had to look north towards Cuyahoga Falls to see if I could get a reflection, that was looking over my left shoulder. (R. 8.)

Q. What was your reason for looking toward Cuyahoga Falls? A. One to see if there was a reflection of a headlight coming around the curve. I couldn't see the light down at Evans Avenue. (R. 8.)

Q. Why couldn't you? A. The eastbound train was blocking it. (R. 8.)

Q. Now while you were standing facing the way you were, were you able to see traffic back on Home Avenue at that time? A. No. (R. 10.)

Q. Were you able to see traffic that was west of you that was going east? A. No. (R. 10.)

Q. All right, and then what happened, tell the jury in your own words, what happened? A. I turned my head to look towards Cuyahoga Falls, that would be north, and I was watching for a train to come around there before I'd clear the crossing to let traffic through, and just as the caboose got up on the crossing I went to make just a step backwards and a turn, and that's when I was hit. From then on I didn't remember anything. (R. 10.)

Q. Had you signalled traffic forward? A. No, sir." (R. 10.)

In the instant case the jury was justified in finding that the method of performing his work required a division of petitioner's attention; that he was thrust into an unsafe place to work, in the night season, in the intersection of two of the heaviest travelled and most dangerous traffic arteries in the State of Ohio, where a lot of other cars had "jumped the gun" and where petitioner, while performing his work was struck before he could face traffic. Petitioner was no Janus bearing two faces and able to look in both directions at the same time.

The automobile which struck plaintiff had been stopped on Home Avenue about 60 feet away from the point where plaintiff was standing (R. 35).

The jury could reasonably infer that had plaintiff been permitted to remain with his face toward vehicular traffic on Home Avenue and Tallmadge Avenue he could and would have jumped out of harms way; that because the petitioner's duties divided his attention the importance of the automobile drivers conduct was enlarged.

To use the language of Mr. Justice Brennan in *Rogers v. Missouri Pacific R. Co.*; 352 U. S. 500, 503:

"These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did."

Paraphrasing the language of Mr. Justice Douglas in the *Bailey* case, *supra* (319 U. S. 350).

"* * * These were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing the petitioner with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence * * *. To withdraw such a question from the jury is to usurp its functions." (Words in italics paraphrased, and authorities cited are omitted.)

Clearly the state court in the instant case, in reaching its conclusion that the evidence failed to show negligence on the part of respondent improperly reweighed the evidence and came to an independent conclusion thereon in conflict with the findings of a fully and properly instructed jury. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29. *Wilkerson v. McCarthy*, 336 U. S. 53.

3. The decision of the State Court in the instant case that the occurrence was unforeseeable is in direct conflict with the decisions of this Court.

It cannot be said that the defendant must be exculpated because the automobile driver's conduct was criminally negligent or reckless. The evidence shows that such conduct on the part of automobile drivers had hap-

pened before and was foreseeable. Such drivers are part of the facts of life, as police records demonstrate, and defendant owed plaintiff a duty to take such behavior into account.

The automobile driver's negligence no more relieved this defendant from its obligation than did the criminal act of a third party relieve the defendant in *Cahill v. New York, New Haven & Hartford R. Co.*, 350 U. S. 898 (1956) reversing 224 F. (2d) 637; *Smalls v. Atlantic Coast Line R. Co.*, 348 U. S. 946 (1955), reversing 216 F. (2d) 842. In *Lillie v. Thompson*, 332 U. S. 459 (1957), the Court said at page 462:

"That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence" (Italics supplied).

This Court in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957) in its opinion said:

"It was not necessary that respondent be in a position to foresee the exact chain of circumstance which actually led to the accident."

This Court in *Cahill v. The N. York, N. Haven & Hartford Railroad Co.*, *supra*, 350 U. S. 898 (1956), in reversing the Second Circuit, 224 F. (2d) 637, impliedly sanctioned the views expressed in the minority opinion of the Circuit Court as follows:

"My colleagues' opinion seems to me to amount to saying that, as a matter of judicial notice, such a man could not have jumped to safety when a truck, which had been stationary, four feet away, started in motion. With that position I do not agree. A truck cannot leap forward from rest like a greyhound or a

modern sport-model passenger automobile. I think that we cannot hold that a jury acted unreasonably in believing that an agile young man could not here have rescued himself, had he been looking directly at the truck when it began to move towards him.

Nor do I agree that defendant must be exculpated because the truckdriver's conduct was criminally negligent or reckless. Since such drivers are part of the facts of life, as police records demonstrate, defendant owed plaintiff a duty to train him to take such behavior into account. Such an 'intervening' factor does not exculpate in such circumstances."

4. The decision of the Court of Appeals in the instant case that the negligence of the defendant must be the "proximate cause" in the common law sense, in these Federal Employers' Liability Act cases, is in direct conflict with the latest decisions of the United States Supreme Court.

The opinion of the court below in deciding that "The basis for recovery by an injured employee under the Federal Employers' Liability Act is therefore negligence of the employer in failing to provide a safe place for the employee to work, which negligence proximately causes, in whole or in part, the injuries of which complaint is made," is to be interpreted as meaning that the negligence of the carrier, in addition to being responsible in part for the injury, must also be the "proximate cause" of such injury in the common law sense before liability attaches. For this proposition, it cited 29 *Ohio Jurisprudence*, Negligence, Sec. 68.

That the State Court of Appeals misapprehended the intent of the Federal Employers' Liability Act, that "every * * * railroad * * * shall be liable in damages * * * for such injury or death resulting in whole or in part, * * *

from negligence * * * of such carrier * * * (italics supplied), 45 U. S. C. A. Section 51.

For "legal" cause, we need not and must not go beyond the wording of the Federal Employers' Liability Act. The Supreme Court so held in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, *supra*. See also *Webb v. Illinois Central R. Co.*, 352 U. S. 512, *supra*; *Shaw v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Futrelle v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Deen v. Gulf, C. & S. F. R. Co.*, 353 U. S. 925; *Thomson v. Texas & Pacific R. Co.*, 353 U. S. 926; *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360; *Ringhiser v. Chesapeake & O. R. Co.*, 354 U. S. 901; *McBride v. Toledo Terminal R. Co.*, 354 U. S. 517; *Gibson v. Thompson*, 355 U. S. 18; *Honeycutt v. Wabash R. Co.*, 355 U. S. 424; *Ferguson v. St. Louis-San Francisco R. Co.*, 356 U. S. 41.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE COURT OF APPEALS.

STEVENS, J.

The action filed in the Court of Common Pleas of Summit County, Ohio, by plaintiff, sought the recovery of damages for personal injuries sustained by him while in the performance of his duties as a crossing flagman at Home and Tallmadge Avenues in the City of Akron.

The defendant in the trial court is a railroad company, engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, and the plaintiff was an employee of defendant, concededly within the class of persons entitled to the benefits of that Act.

The petition of plaintiff alleged that:

On January 2, 1952, plaintiff, while discharging his duties as crossing flagman, was standing on Tallmadge Avenue, at a point just west of defendant's tracks at the Home Avenue intersection with Tallmadge Avenue, warning the traveling public of the presence of one of defendant's trains, when he was suddenly and violently struck by an automobile being driven in a northeasterly direction on Home Avenue and making a left turn into Tallmadge Avenue at said intersection, with resultant serious injuries.

As the case was submitted to the jury by the trial court, the petition contained the following specifications of negligence:

1. " * * * the defendant negligently and carelessly ordered and directed plaintiff to perform his duties as a flagman at said crossing, when it was impossible for him to observe vehicles entering said intersection from Home Avenue and without taking any measures to prevent him from being struck, as aforesaid."

2. *** failed to place another employee at said crossing to watch for other trains approaching said crossing, while plaintiff was on duty flagging, to the end that plaintiff could keep a lookout and watch for traffic proceeding from Home Avenue into said intersection, and particularly the vehicle that struck plaintiff as aforesaid."

For answer to the petition of plaintiff as subsequently amended, defendant admitted the following:

1. Its corporate existence as a railroad, owning and operating railroad lines through several parts of the United States, one of which lines extends into and through the City of Akron, Ohio.

2. That on January 2, 1952, plaintiff and defendant were engaged in interstate commerce.

3. That Tallmadge and Home Avenues were duly dedicated public streets in the City of Akron, which intersected.

4. On information and belief, that on or about January 2, 1952, at 12:10 a.m., while plaintiff was on duty as a flagman at the above-mentioned intersection, he was struck by an automobile and sustained some personal injuries, but denied that the same were of the nature and character alleged.

All other allegations of the petition were denied.

Upon trial to a jury, a verdict for plaintiff in the amount of \$25,000 was returned, upon which judgment was duly entered.

This appeal on questions of law ensued.

The pleadings in this case do not, in terms, present the claim of plaintiff that defendant negligently failed to furnish plaintiff with a safe place to work, under the Federal Employers' Liability Act. However, in view of the pronouncement in par. 16 of the syllabus in *Denny v.*

Montour Rd. Co., 101 Fed. Supp. 735, that question was in the case, and the court was required to charge thereon.

It is stated in *Ellis v. Union Pacific Rd. Co.*, 329 U. S. 649, at p. 653:

"The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. 45 USCA Sec. 51, 10 AFCA title 45, Sec. 51 * * *."

In *Bailey, Adm'r., v. Central Vermont Ry., Inc.*, 319 U. S. 350, the fourth paragraph of the syllabus states:

"4. An employer is under a common-law duty to use reasonable care in furnishing his employees with a safe place to work."

It is thus apparent that, while the Act itself does not in terms require the employer to furnish the employee with a safe place to work, the cases decided by the Supreme Court of the United States under the Act, do impose upon the employer the common law duty to exercise reasonable care to furnish his employee with a safe place to work.

The basis for recovery by an injured employee under the Federal Employers' Liability Act is therefore negligence of the employer in failing to provide a safe place for the employee to work, which negligence proximately causes, in whole or in part, the injuries of which complaint is made.

In 29 O. Jur., *Negligence*, Sec. 68, the following appears:

"It is a well-established rule that to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural

and probable consequence of the negligence alleged, and that it was such as might or ought to have been foreseen in the light of the attending circumstances. In contemplation of law, an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable."

Let us now examine this record in the light of the foregoing statement of the applicable rules.

Tallmadge Avenue, an east and west traffic artery in the City of Akron, is intersected by Home Avenue, a street running in a northeasterly and southwesterly direction. Three tracks of defendant extended through the intersection of these two streets in a northwesterly and southeasterly direction, the most easterly being a switch track, the middle track the eastbound main track, and the most westerly the westbound main track.

The defendant installed the following equipment to warn the defendant and the traveling public of the approach of trains to said crossing:

Highway warning signals known as "flasher lights" at all street approaches to the crossing, consisting of two lights with red lenses directed toward approaching traffic, which, when activated, gave a flashing signal warning to motorists of the approach of a train. On the side of the body of these lights were windows which emitted a white light when the lights were in operation.

In the watchman's shanty at the southeast corner of Tallmadge Avenue, the defendant installed a warning or "tell-tale" light to warn the watchman of the approach of trains, and a listening phone on which could be heard the dispatcher at XN Tower, 1½ miles north of the crossing, issuing orders to trains and giving their location on the line.

Outside the shanty, on a 25-foot pole near the south curb of Tallmadge Avenue east of the crossing, was an amber light, which was activated and would light up when trains approached the crossing.

To the south of the crossing was a black signal on a mast 27 feet high, consisting of a disc with two red lights in a horizontal position, and two yellow lights in a diagonal position, with a white light in the center of the disc.

A red signal appeared when a westbound train was within the block, requiring the engineer of the following train to stop before reaching the signal.

A yellow signal required the engineer of a westbound train in the block to reduce his speed to 35 miles an hour.

The white light, which could be seen from the crossing, would appear when either the red or yellow signal was in operation.

When none of said lights was in operation, this indicated the absence of a westbound train from the block.

As an eastbound train approached the crossing, at a point 2066 feet south of the crossing, the wheels of the train would strike an insulated joint, which put in operation the flasher light circuit, the block signal circuit, the "tell-tale" light in the watchman's shanty, and the amber light on top of the pole near the south curb line of Tallmadge Avenue—all of which signals would remain in operation until the last car of the eastbound train passed over another insulated joint 75 feet north of the crossing, when all of said signals would discontinue operating.

Upon the approach of a westbound train to the crossing, when the wheels thereof reached a point 3455 feet north of the crossing, they would strike an insulated joint, setting into operation the block signal heretofore mentioned, the "tell-tale" light in the watchman's shanty, and the amber light south of the curb on Tallmadge Avenue.

When the wheels had reached a point 2000 feet north of the crossing, the flasher lights would be activated, and would continue to operate until the wheels of the last car passed over an insulated joint 105 feet south of the crossing, which would deactivate them.

The evidence shows all of these signals to have been in proper working order on January 2, 1952, at the time here in question.

In addition to the foregoing, the crossing flagman was furnished with one "stop" disc sign, three red flags for use by day, two red lanterns, one white lantern, and one green lantern, for use when flagging at night, six or more fusees, six or more torpedoes, and a shrill whistle.

Stop signs were erected for Home Avenue traffic approaching the crossing from the south, on the right or easterly side of Home Avenue before the tracks were reached, and near the intersection of Home Avenue where it joined Tallmadge Avenue—the latter being a main thoroughfare.

The crossing and intersection were well lighted by street lights at the time under consideration.

The plaintiff, on January 2, 1952, had been employed by defendant as a crossing watchman for about three years, working the 11 p.m. to 7 a.m. shift at the Bettes Corners grade crossing.

Shortly after midnight on said date, the tell-tale light in the watchman's shanty started flashing, indicating the approach of a train from the west, and the other warning signals heretofore described went into operation.

In accordance with his instructions, plaintiff stationed himself in the center of Tallmadge Avenue, to the west of the crossing, two or three feet west of the westerly rail of the westbound track, having with him his whistle, and lighted red and green lanterns.

When the train got close enough to the crossing, plaintiff blew his whistle and began swinging his red lantern.

While thus engaged, one James Ball was stopped on Home Avenue in a line of traffic, several cars back from the intersection of Home Avenue and Tallmadge Avenue.

There is uncontroverted evidence in this record that, at the time of plaintiff's injury, Ball was under the influence of alcohol.

As the train passed over the crossing, plaintiff took a step backward, when he was struck by Ball's automobile, which had left the northbound line of traffic on Home Avenue, and had proceeded northerly upon the left, or westerly, side thereof, to the intersection of Home and Tallmadge Avenues, where Ball, at a high rate of speed, made a short turn onto Tallmadge Avenue, and, proceeding westerly, collided with and injured plaintiff.

In so doing, Ball violated five state traffic statutes, and municipal ordinances of the City of Akron dealing with the same subjects.

At the conclusion of all the evidence, defendant moved for a directed verdict, which motion was overruled; and after the return of the verdict for plaintiff, defendant moved for a judgment notwithstanding the verdict, which motion was also overruled.

There are seventeen assignments of error presented by appellant, only a few of which will be discussed.

The assignment of error designated "1(a)" in appellant's brief dealing with the alleged inconsistency between the special findings of fact and the general verdict, is, in our opinion, completely negatived by the decision of the Supreme Court of the United States in the case of *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U. S. 360, 1 L. Ed. 2d 889.

We find no prejudicial error in connection with this assignment.

Assignment "1(b)" asserts:

"The Trial Court erred in overruling the motion of defendant for judgment notwithstanding the verdict, based on the failure of plaintiff's proof; the Trial Court erred in overruling the motion of defendant for a directed verdict and for judgment in its favor at the close of all the evidence."

The entire record in this case has been studied by the members of this Court, as have been the law and the cases defining the obligations of the parties to this litigation.

If the predicate for liability of defendant employer is negligence, which proximately caused, in whole or in part, the injuries complained of by plaintiff, then, as part of the subject of proximate cause, the question of foreseeability was presented.

There is no evidence in this record of failure on the part of defendant to furnish plaintiff with all of the safeguards in the performance of his work, which reasonably prudent operators of railroads furnish under like or similar circumstances. And there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff.

That the plaintiff, while in the discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, was not, in our opinion, such an occurrence as, under the evidence of this record, was reasonably foreseeable by defendant.

There was, accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it.

To abridge the statement of the court in *Orton v. Pennsylvania Rd. Co.*, 7 F. 2d 36, at p. 38.

"The most that can be said for plaintiff is that the defendant created a situation in which" the negligence of James Ball "operated to bring about the" injury * * *. "Defendant's act was merely a condition and in no sense a concurring proximate cause of the injury."

We hold that the court prejudicially erred when it overruled defendant's motion for a directed verdict, made at the conclusion of all the evidence, because there was a complete failure of proof to establish the negligence alleged in the petition, or any negligence of defendant which proximately caused, in whole or in part, the injuries to plaintiff. *Lavender, Admr., etc., v. Kurn, et al., etc.*, 327 U. S. 645, 90 L. Ed. 916, par. 4 of syllabus.

Likewise, there was prejudicial error in overruling the motion of defendant for judgment notwithstanding the verdict, for the reasons above set forth.

It is next asserted that "The trial court erred in overruling the separate motions of defendant to withdraw each specification of negligence" contained in plaintiff's petition as heretofore set forth "from the consideration of the jury at the close of all the evidence."

Inasmuch as we have determined that there was a complete failure of proof to substantiate the allegations of negligence contained in the petition, or included therein under the pronouncements of the federal courts, we conclude that the motions to withdraw the specifications of negligence from the consideration of the jury, at the close of all the evidence, should have been sustained; and that the court prejudicially erred in overruling said motions.

Assignment of error No. 7 charged that "The trial court erred in giving written instructions of law before argument requested by the plaintiff."

Instruction 2 stated:

"* * * the defendant * * * owed a duty to its employee Carl C. Inman to use reasonable care to provide him with a reasonably safe place in which to work * * *."

Instruction 4 provided:

"* * * that reasonable care is that degree of care which a reasonable man maintains in similar circumstances. The reasonable care which the defendant railroad owed to plaintiff * * * was that degree of care which a reasonably prudent person operating a railroad would use, having in mind the dangers of such an operation and the requirements of reasonably providing for the safety of the railroad's employees."

It is urged that these instructions were prejudicially erroneous because they introduced an issue not raised by the pleadings—viz., whether defendant exercised reasonable care to provide plaintiff with a reasonably safe place to work.

The case of *Denny v. Montour Rd. Co. supra*, paragraph 16 of the syllabus, makes appellant's contention in this respect untenable.

As to the other claims of appellant, concerning the special charges before argument requested by plaintiff and given by the court, we find them not to be well taken.

The next error assigned by appellant is, that "The trial court erred in refusing to give written instructions of law before argument requested by defendant."

The defendant requested the court to give defendant's written instructions 4, 5, 6, 7 and 8 before argument, which requests, as to all of said instructions, were refused by the court.

Each of those instructions contained a statement of a statutory traffic provision in the words of the statute, together with the following statement:

“* * * the court further says to you that under the undisputed evidence of this case, the operator of the motor vehicle which came into collision with plaintiff violated this requirement of law and that defendant, in the exercise of ordinary care to provide plaintiff a reasonably safe place to work, was not required to anticipate or foresee such violation.”

The violation of all of said statutes by Ball, the driver of the auto which struck plaintiff, is not denied.

There is contained in this record no evidence of previous occurrences of like nature at this crossing, involving injury to a crossing watchman.

It is stated in 29 *O. Jur.*, Negligence, Sec. 95:

“It is a well-established rule that, in the absence of knowledge to the contrary, an individual to whom a duty is owed has a right to assume that it will be performed. This rule applies to duties arising by force of statutes or ordinances * * *.”

Henderson v. Cleveland Ry. Co., 123 O. S. 468, is cited as supporting authority, as is *Cleveland Ry. Co. v. Goldman*, 122 O. S. 73.

All of the statutes in question were passed for the benefit of users of the public highways, to which class both plaintiff and defendant belonged, and Ball owed to both plaintiff and defendant the duty to comply with the statutory provisions; and, in the absence of knowledge that Ball refused to comply with his statutory duties, both plaintiff and defendant had a right to assume that he would comply therewith.

As bearing upon the question of whether the defendant exercised ordinary care in providing the plaintiff with a reasonably safe place to work, it is our conclusion that, relating to the question of foreseeability, in connection with the subject of proximate cause, the five requests of

defendant to charge before argument should have been given, and that the refusal to so charge constituted prejudicial error.

There was also prejudicial error because of the refusal of the court to include the contents of the requested charges before argument, or a correct statement of law on the subject matter of each, in its general charge, upon being requested so to do by defendant.

There was error in the charge of the court in stating that James Ball, the operator of the motor vehicle which struck plaintiff, was guilty of negligence as a matter of law, without instructing the jury of what that negligence consisted.

We further hold that the trial court prejudicially erred in overruling the defendant's motion for a new trial; that the verdict and the judgment entered thereon are not sustained by any probative evidence; and that the judgment is contrary to law.

As to the other errors assigned but not discussed herein, we hold none of them to have constituted prejudicial error.

The judgment is reversed, and this Court will enter the judgment which the trial court should have entered. Final judgment in favor of defendant will be entered, at the costs of plaintiff.

HUNSICKER, P.J., and DOYLE, J., concur.

ORDER OF THE COURT OF APPEALS.

The said parties appeared by their Attorneys, and this cause came on to be heard upon the Notice of Appeal of said The Baltimore and Ohio Railroad Company, Defendant-Appellant herein, together with the Assignments of Error of said Appellant, a Transcript of the Docket or Journal Entries of the Court of Common Pleas of Summit County, Ohio, and such original papers, or transcripts thereof, as were necessary for said appeal, filed therewith in the said Court of Common Pleas of Summit County, Ohio, wherein said Carl C. Inman was Plaintiff and said The Baltimore and Ohio Railroad Company was Defendant, mentioned and referred to in said Notice of Appeal, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid, there is error manifest upon the face of the record to the prejudice of the Appellant, in this, to-wit:

(a) That said Court of Common Pleas erred in overruling the motion of said Defendant for a directed verdict and for judgment in its favor at the close of all the evidence, because there was a complete failure of proof to establish the negligence alleged in the petition;

(b) That said Court of Common Pleas erred in overruling the motion of said Defendant for judgment notwithstanding the verdict, because there was a complete failure of proof to establish the negligence alleged in the petition;

(c) That said Court of Common Pleas erred in overruling the separate motions of said defendant to withdraw each specification of negligence from the

consideration of the Jury, made at the close of all the evidence;

(d) That said Court of Common Pleas erred in refusing to give written instructions of law numbered 4, 5, 6, 7 and 8 before argument requested by said Defendant;

(e) That said Court of Common Pleas erred in refusing to give to the Jury each of said written instructions of law numbered 4, 5, 6, 7 and 8 as a part of the general charge, upon being requested so to do by said Defendant;

(f) That said Court of Common Pleas erred in refusing to correctly charge the Jury, as a part of the general charge, on subject matters contained in each of said written instructions of law numbered 4, 5, 6, 7 and 8, as requested by said Defendant;

(g) That said Court of Common Pleas erred in its general charge by stating that James Ball, the operator of the motor vehicle which struck said Plaintiff, was guilty of negligence as a matter of law, without instructing the Jury of what that negligence consisted;

(h) That said Court of Common Pleas erred in overruling the motion of said Defendant for a new trial;

(i) That the verdict of the Jury and the Judgment rendered thereon by said Court of Common Pleas are not sustained by any probative evidence;

(j) That the Judgment of said Court of Common Pleas is contrary to law;

and in that said Court of Common Pleas entered judgment for said Plaintiff-Appellee, when such judgment should have been entered for said Defendant-Appellant.

It is, therefore, considered, ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Summit County, Ohio be and the same is hereby reversed and held for naught. And this Court coming now to render the judgment which the Court of Common Pleas of Summit County, Ohio, ought to have rendered, final judgment is now entered in this Court for said Defendant-Appellant.

It is further ordered that this cause be remanded to the Court of Common Pleas of Summit County, Ohio, to carry this judgment into effect and for execution; and that said Plaintiff-Appellee pay the costs of this proceeding taxed at \$ and in default thereof that an execution issue therefor.

To all of which said Plaintiff-Appellee, by counsel, excepts.

/s/ OSCAR HUNSICKER,

Presiding Judge for the County.

**ORDER, SUPREME COURT OF OHIO, DENYING MOTION
TO CERTIFY RECORD.**

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, upon the motion of the appellee to dismiss the appeal, filed as of right herein and was argued by counsel.

On consideration whereof, it is ordered, and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at \$

ORDERED, that a special mandate be sent the Court of Common Pleas of Summit County, to carry this judgment into Execution.

ORDERED, that a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry."

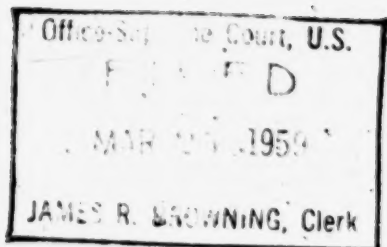
**ORDER, SUPREME COURT OF OHIO, DISMISSING
THE APPEAL.**

It is ordered by the Court that this motion be, and the same hereby is, overruled.

**ORDER, SUPREME COURT OF OHIO, DENYING
APPLICATION FOR REHEARING.**

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

LIBRARY
SUPREME COURT. U. S.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~134~~

36

CARL C. INMAN,

Petitioner,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

C. G. ROETZEL,

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Counsel for Respondent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 724

CARL C. INMAN.

Petitioner.

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes referred to by petitioner (Petition, pp. 3-4), the following statutes of the State of Ohio are involved in this case and are set forth in an Appendix to this brief at pages 13-14:

Ohio Gen. Code Sec. 6307-20 (now Ohio Rev.
Code Sec. 4511.20);

Ohio Gen. Code Sec. 6307-30 (now Ohio Rev.
Code Sec. 4511.30);

Ohio Gen. Code Sec. 6307-35 (now Ohio Rev.
Code Sec. 4511.36);

Ohio Gen. Code Sec. 6307-38 (now Ohio Rev. Code Sec. 4511.39);

Ohio Gen. Code Sec. 6307-42 (now Ohio Rev. Code Sec. 4511.43).

QUESTIONS PRESENTED

1. By pleading a cause of action under the Federal Employers Liability Act, does the plaintiff acquire an absolute right to have issues submitted to a jury, unfettered by any judicial review of the evidence offered in support of his cause?

2. Does the plaintiff establish a prima facie case under the Federal Employers Liability Act by showing that while on duty as a grade crossing watchman he was struck and injured by a reckless and drunken hit-and-run driver?

STATEMENT OF THE CASE

The petitioner's statement of the case is more argumentative than factual. This is perhaps understandable, since the essential facts which are not in dispute do not favor his cause against the respondent. In view of the omissions and inaccuracies in the petitioner's statement, however, it becomes necessary to give some account of the facts which are supported by the evidence in the record.

The case involves injuries to a railroad crossing watchman who was struck by a reckless and drunken hit-and-run driver at a grade crossing in the City of Akron, Ohio on January 2, 1952. The physical characteristics of the crossing are important in the consideration of the case and warrant a rather detailed description.

At this crossing, known as "Bettes Corners," Tallmadge Avenue, a main thoroughfare running east and west, was intersected by Home Avenue, running in a slight north-east-southwest direction. Three railroad tracks of the re-

spondent extended through the intersection of these two streets in a slightly northwesterly and southeasterly direction. The most easterly track was a side or switch track, the middle was the eastbound main, and the most westerly was the westbound main track (Joint Ex. A; R. 236, 370).

All street approaches to the railroad crossing were protected by highway warning signals, commonly known as "flasher lights." Located to the east of the side track and south of Tallmadge Avenue was a watchman's shanty, where the railroad crossing watchman would stay when he was not flagging for approaching trains, and where his special equipment, consisting of lamps, stop signs, fusees, torpedoes, etc., was kept (R. 38, 39). There was also a listening phone in the shanty connected with the nearby XN Tower so that the watchman could hear the dispatcher issuing orders and giving the location of various trains (R. 46). A "tell-tale" flashing light inside the shanty gave the watchman notice of an approaching train (R. 5). Outside the shanty there was a similar flashing light to give notice of approaching trains, located on a 25-foot pole near the south curb of Tallmadge Avenue, east of the crossing (R. 179).

The electrical circuits controlling these signals were so arranged that the "tell-tale" flashing lights in and outside the shanty commenced operation when an eastbound train was 2,066 feet from the crossing, and when a westbound train was 3,455 feet from the crossing. The highway flashers were activated when a train from either direction was about 2,000 feet from the crossing. Both the flashers and the "tell-tale" lights continued to function until the respective trains had cleared the crossing by 75 to 105 feet (R. 178-180, 192-193). There was also a standard railroad block signal located to the south of the crossing on a mast 27 feet high, by which the watchman could determine when any

westbound train was within 3,455 feet of the crossing (R. 60-61, 182-183).

All of the signals described were inspected before and after the accident and were found to be in perfect working order (R. 184).

For Home Avenue traffic approaching from the south, there was one standard highway stop sign near the flasher lights before reaching the tracks and another after passing the tracks directly at the intersection of Tallmadge Avenue, a main thoroughfare (R. 56-57). There was a City street light on a pole about 25-30 feet west of the tracks on the south side of Tallmadge Avenue, which had a shield to direct the rays downward on to the street (R. 25, 52).

At the time of the accident on January 2, 1952, the petitioner had been employed by The Baltimore and Ohio Railroad Company as a crossing watchman for about seven years, and had been working the 11:00 P.M. to 7:00 A.M. shift at the "Bettes Corners" crossing for about three years (R. 1, 2). He was thoroughly familiar with the crossing, with his duties and with the Company rules governing the work in which he was engaged (R. 5-9, 38).

Shortly after midnight, the "tell-tale" lights at the watchman's shanty and the highway flashers began flashing, indicating the approach of an eastbound train. As was his duty and custom, the petitioner left the shanty and stationed himself in the center of Tallmadge Avenue, about 2 or 3 feet west of the westbound tracks. He was carrying a whistle and red and green lanterns. The night was cold but clear and the pavement was dry (R. 6-7, 47). When the train "got close enough" to the crossing, the petitioner blew his whistle and began swinging the red lantern which he held in his right hand to stop traffic, first on Tallmadge Avenue, then on Home Avenue, making sure that all vehi-

cles saw the signal (R. 47). The crossing was well lighted and he was standing in the rays of one of the City's lights located on the southwest corner of the crossing (R. 55, 340). The eastbound train, consisting of a steam engine, 80 empty gondola cars and a caboose, passed over the crossing (R. 163, 165). Just after the caboose cleared the crossing, an automobile driven by one James Ball, which had been waiting in line behind several other cars headed north on Home Avenue, pulled out of the line of traffic and with tires screeching drove up to the crossing at a high rate of speed in the wrong lane of traffic, made a sharp left turn into Tallmadge Avenue, struck and injured the petitioner and sped away from the scene (R. 71-77, 138, 153-156). There is uncontradicted evidence that the driver, Ball, was under the influence of alcohol at the time (R. 135). It is also undisputed that from the time that he pulled out of the line of traffic until he struck the petitioner, Ball violated the five Ohio traffic statutes set forth in the Appendix to this brief at pages 13-14. There is no question or contention in this case as to the manner in which the accident occurred.

The petitioner brought suit against The Baltimore and Ohio Railroad Company under the Federal Employers Liability Act in the Court of Common Pleas of Summit County, Ohio, and received a verdict and judgment in the amount of \$25,000.00.

The Ohio Court of Appeals reversed and entered final judgment for the defendant, holding that the verdict and judgment of the trial court were not sustained by any probative evidence. The Court of Appeals also ruled that the trial court had committed prejudicial error in the rulings on the instructions and in the general charge to the jury, which would have required a new trial. (Petition, Appendix pp. 17-28).

In the Supreme Court of Ohio, after the filing of briefs and oral argument, the petitioner's motion to certify the record was denied; his appeal as of right was dismissed; and his application for rehearing was denied (Petition, Appendix pp. 31, 32).

ARGUMENT

1. The Petitioner Was Not Entitled To Have His Case Submitted To A Jury Because He Presented No Evidence of Railroad Negligence.

The petitioner seems to feel that by pleading a purported cause of action under the Federal Employers Liability Act he acquires an absolute and inalienable right to have issues submitted to a jury. He claims that he has been deprived of this "right" because the Court of Appeals has examined the record to see whether there is any evidence to support his cause. While his present quarrel is with the Court of Appeals and the Supreme Court of Ohio, he would undoubtedly have asserted a similar claim of deprivation had the trial court correctly performed its duty by directing a verdict for the defendant. In short, the petitioner seeks to preclude *any* judicial review of the sufficiency of the evidence.

Despite any contrary illusions which the petitioner may hold, there is no law which permits any plaintiff to recover damages upon mere allegations of negligence without proof to support them. The right of a plaintiff to have a jury decide his case arises only when *evidence* is produced to sustain his claim.

- It is and has always been the function and the duty of the courts to determine whether there is sufficient evidence to be submitted to a jury. And it is well settled that in making this determination, the courts do not invade the

province of the jury, nor deprive a plaintiff of his constitutional right to a trial by jury. *Commissioners of Marion County v. Clark*, 94 U.S. 278, 284; *Baltimore and Ohio R. Co. v. Groeger*, 266 U.S. 521, 524; *Gunning v. Cooley*, 281 U.S. 90, 94; *Galloway v. U. S.*, 319 U.S. 372.

The standard to be applied in reviewing the sufficiency of the evidence in cases arising under the Federal Employers Liability Act has been enunciated in the recent decision in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, where the Court said, at pages 506, 507:

"Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

Subsequent decisions have consistently followed and cited the pronouncement from the *Rogers* case. *Arnold v. Panhandle and Santa Fe R. Co.*, 353 U.S. 360; *McBride v. Toledo Terminal R. Co.*, 354 U.S. 517; *Gibson v. Thompson*, 355 U.S. 18. The statement gives recognition to certain fundamental principles which the petitioner has completely ignored. First there must be proof (as distinguished from theories or allegations) of negligence. Second, the proof must justify the reasonable conclusion that negligence of the employer played some part in the injury. Third, there must be some judicial appraisal of the proofs.

The Court of Appeals has scrupulously followed these principles in making an appraisal of the proofs offered in this case and has reached the only reasonable conclusion, i.e., that there was no negligence on the part of the defendant (Opinion of the Court of Appeals, Petition, Appendix p. 24).

2. The Petitioner Has Not Established a Prima Facie Case Under the Federal Employers Liability Act by Showing That While on Duty as a Grade Crossing Watchman He was Struck by a Reckless and Drunken Hit-and-Run Driver.

It should be emphasized that there is no dispute whatever in this case as to the manner in which the petitioner was injured. He was standing at a well-lighted crossing and the intersecting streets were all protected by operating flasher lights. The warning devices installed by the railroad had given him ample notice of the approach of the train and he had been furnished with lamps and a whistle to stop highway traffic. Automobiles had been stopped for some minutes awaiting the passage of the train and three of these motorists gave uncontradicted testimony that the watchman was in plain sight at the time (Bailey, R. 70; Feathers, R. 139; Martin, R. 154). Everything was under control as the caboose on the end of the train approached the crossing and there was no reason to anticipate danger from any source. Then suddenly, a drunken driver pulled his automobile out of the line of traffic, and came up to the crossing at a high rate of speed on the wrong side of the street, ignored stop signs, illegally turned, struck and injured the petitioner and raced away from the scene. The petitioner was the unfortunate victim of a drunken hit-and-run driver, but there is not a scintilla of evidence in the entire record of any negligence on the part of the railroad.

In searching the record, the petitioner has struck upon two isolated phrases in the testimony and labels them "evidence" to support his theories of negligence.

The first comes from the witness Bailey, a motorist waiting at the crossing who, in describing this occurrence, refers to "this car, like a lot of them I seen there, jumping the gun." To characterize the criminally reckless conduct of

the hit-and-run driver as "jumping the gun" is rather grotesque. But even more fantastic is the petitioner's conclusion, *based solely and explicitly upon this fragment of testimony*, that the respondent could or should have anticipated and prevented this criminal negligence which injured him. Though the petitioner had been working at the crossing for several years there is not the faintest suggestion in his testimony or from any other source that there had ever been any similar occurrence or any other kind of accident whatever.

The second fragment of testimony, lifted from context and cited in the petition, is from Raymond Peterson, a brakeman standing on the rear platform of the caboose as the train passed the crossing. In describing his own activities, Peterson said:

"It is customary when passing a place where an employee may be stationed to observe that employee so as to see if he gives a signal that would affect your movements of your train, such as a hot box, and so forth" (R. 167-168).

In cross-examination, counsel for the petitioner asked the question cited at page 10 of the petition:

"You say it was the watchman's duty to keep watching your train as it went by to see if there were any hot boxes or anything wrong with your train, and if there was he'd give you a signal? That is customary?"

To which Peterson replied:

"That's customary, other duties permitting he is generally required to do that" (R. 172).

The import of this testimony is clear. Obviously if the watchman happened to see a hot box on a passing train he would tell somebody about it. *But the petitioner did not testify that he had any duty other than to warn highway*

traffic of passing trains. It is apparent that the petitioner was not paying any attention to the train on this occasion for he thought it contained about forty-five box cars, whereas there were actually 80 empty gondola cars (R. 44, 165). Furthermore, there is uncontroverted evidence that the petitioner was not facing the train when he was struck and injured. See the testimony of petitioner (R. 10, 229); Sam Bailey (R. 74-75); Charles Feathers (R. 143-144); John Martin (R. 153-154); and Raymond Peterson (R. 169). There is no evidence and no possible inference that the duties of the petitioner had any remote connection with his injury.

There are several cases involving similar factual situations in which directed verdicts for the defendant have been upheld. In *Woods v. New York Central R. Co.*, 222 F. 2d 551 (6th Cir., 1955), a plaintiff was employed by the defendant railroad as a crossing watchman at the intersection of defendant's double tracks and Main Street in Springfield, Ohio. At 3:00 A.M., upon receiving a signal that a train was approaching, plaintiff started the flasher lights and took his position in the middle of the street. While blowing his whistle and swinging his lantern to warn traffic of the approaching train, a motorist crashed into plaintiff and thereafter fled the scene. On the trial, the court directed a verdict in favor of defendant; and upon appeal, the Court of Appeals affirmed, holding that there was no evidence of negligence on defendant's part. See also *Murray v. Atlantic Coast Line R. Co.*, 218 N.C. 392, 11 S.E. 2d 326 (1940); *Boyd v. Seaboard R. Co.*, 200 N.C. 324, 156 S.E. 507 (1931).

The decisions in *Lillie v. Thompson*, 332 U.S. 459; *Cahill v. New York, New Haven and Hartford R. Co.*, 350 U.S. 898, 351 U.S. 183; and *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, do not support the petitioner's argument in

this case. Rather, they tend to emphasize that where the injury is caused by the wrongful act of a third person, there must be probative evidence upon which a jury can properly infer that the injury was foreseeable by the employer.

The decision of the Court of Appeals in this case is not based upon any technical arguments as to proximate cause, but rather on the complete absence of any evidence of negligence. As the court said in its opinion (Petition, Appendix p. 24):

"There is no evidence in this record of failure on the part of defendant to furnish plaintiff with all of the safeguards in the performance of his work, which reasonably prudent operators of railroads furnish under like or similar circumstances. And there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff.

That the plaintiff, while in the discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, was not, in our opinion, such an occurrence as, under the evidence of this record, was reasonably foreseeable by defendant.

There was, accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it."

The Court of Appeals has not weighed the evidence; it has simply looked at the record, in accordance with the mandate of this Court in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, and found that the proofs do not justify the conclusion that the negligence of the employer played any part at all in the injury.

CONCLUSION

The decision is clearly correct and is not in conflict with any decision of this court. The petition for writ of certiorari should be denied.

Respectfully submitted,

C. G. ROETZEL,

JOHN L. ROGERS, JR.,

Counsel for Respondent.

APPENDIX

STATUTES OF THE STATE OF OHIO

Ohio Gen. Code Sec. 6307-20 (now Ohio Rev. Code Sec. 4511.20):

Reckless operation of vehicles.

No person shall operate a vehicle, trackless trolley or street car without due regard for the safety and rights of pedestrians and drivers and occupants of all other vehicles, trackless trolleys and street cars, and so as to endanger the life, limb or property of any person while in the lawful use of the streets or highways.

Ohio Gen. Code Sec. 6307-30 (now Ohio Rev. Code Sec. 4511.30):

Driving to left of center line forbidden, when.

(a) No vehicle or trackless trolley shall, in overtaking and passing traffic, or at any other time, be driven to the left of the center or center line of the roadway under the following conditions:

* * *

3. When approaching within one hundred feet of or traversing any intersection or railroad grade crossing, unless compliance with this section is impossible because of insufficient roadway space.

Ohio Gen. Code Sec. 6307-35 (now Ohio Rev. Code Sec. 4511.36):

Rules governing turns at intersections.

The driver of a vehicle intending to turn at an intersection shall do so as follows:

* * *

(b) At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that

portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

* * *

Ohio Gen. Code Sec. 6307-38 (now Ohio Rev. Code Sec. 4511.39):

Appropriate signal to be given when turning or changing speed; mechanical signal device.

(a) No person shall turn a vehicle or trackless trolley from a direct course upon a highway unless and until such person shall have exercised due care to ascertain that such movement can be made with reasonable safety to other users of the highway and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the event any traffic may be affected by such movement.

* * *

Ohio Gen. Code Sec. 6307-42 (now Ohio Rev. Code Sec. 4511.43):

Right-of-way at through highway; stop signs.

(a) The operator of a vehicle, intending to enter a through highway, shall yield the right of way to all other vehicles, street cars or trackless trolleys on said through highway.

(b) The operator of a vehicle, street car or trackless trolley shall stop in obedience to a stop sign at an intersection where a stop sign is erected and shall yield the right of way to all other vehicles, street cars or trackless trolleys not so obliged to stop.

AUG 22 1959

JAMES B. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 36.

CARL C. INMAN,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF OHIO.

BRIEF ON THE MERITS.

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 36.

CARL C. INMAN,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF OHIO.**

BRIEF ON THE MERITS.

OPINION BELOW.

The judgment of the Common Pleas Court may be found (R. 240). The opinion of the Court of Appeals of Summit County, Ohio (R. 248), is unreported. The decision of the Supreme Court of Ohio dismissing petitioner's appeal "filed as of right herein" (R. 264), is reported in 168 O. S. 335. The decision of the Supreme Court of Ohio overruling the motion of petitioner for an order directing the Court of Appeals of Summit County, Ohio, to certify its record (R. 266) appears in 31 Ohio Bar No. 44. The decision of the Supreme Court of Ohio denying the application for rehearing (R. 267) appears in 31 Ohio Bar, No. 47.

JURISDICTION.

The jurisdiction of this Court is found in 62 Stat. 928.
28 U. S. Code, Sec. 1257(3).

STATUTES INVOLVED.

The Federal Employers' Liability Act, 35 Stat. 65; 45
U. S. C. A. 51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

State Courts; Appeal; Certiorari. 62 Stat. 929; 28
U. S. Code 1257.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

3. By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

QUESTIONS PRESENTED.

1. Did the Court of Appeals of the State of Ohio err in holding as a matter of law that the evidence adduced does not show any negligence of respondent, and does not permit the inference, or authorize the jury to infer, that the respondent was negligent as charged and submitted?

2. In an action under the Federal Employer's Liability Act, 45 U. S. C. 51 *et seq.*, where the employer sent an employee as a crossing watchman, in the night season, to stand directly in the intersection of two heavily travelled highways, immediately west of its railroad tracks, and the highways intersected at both sides of the railroad tracks, which crossed both highways diagonally between both intersections, and the employee's duties required him to face the train, with his back to traffic, as the train was passing over the crossing, thus creating a likelihood that the employee might be struck by a vehicle of a third party, which in fact occurred, can the state court say as a matter of law that there was no actionable negligence?

3. In an action under the Federal Employer's Liability Act, can it be said that where the employee is struck by an automobile driven by a third party, that defendant must be exculpated, as a matter of law, because the automobile driver violated traffic statutes or ordinances?

4. Has the State Court of Appeals properly read into the Federal Employer's Liability Act, a requirement that where the injuries resulted "in part" from the employer's negligence, in addition thereto such negligence must be a proximate cause of the injury, in the common law legal sense before liability attaches?

STATEMENT OF THE CASE.

Under the pleadings (R. 1-8) it was admitted that the petitioner's duties as an employee of the respondent were in furtherance of the interstate commerce transportation business of the respondent and that, by reason thereof, the petitioner and the respondent were at all times herein mentioned engaged in interstate commerce and were subject to the Federal Employer's Liability Act.

Tallmadge Avenue (State Route 18) a main traffic artery extends east and west in the City of Akron, Ohio (R. 213), and is intersected on an angle by Home Avenue, which extends in a northeasterly and southwesterly direction (R. 215). Respondent operates a 3 track line diagonally across the intersection of both highways (R. 212). Home Avenue intersects Tallmadge Avenue on both sides of the railroad tracks (R. 214-215) so that vehicles approaching from the southwest on Home Avenue had the right to and did often turn left into Tallmadge Avenue where the two highways converge along the most westerly track of the railroad (R. 214), (R. 227), (R. 236).

A little after midnight on January 2, 1952 a freight train of the respondent travelling in a northwesterly direction was approaching the crossing, and in the performance of his duties as a crossing flagman, petitioner stationed himself directly in the intersection of Tallmadge and Home Avenues a few feet west of the tracks, as he was instructed (R. 16).

Petitioner was the only flagman on duty at the crossing at that time (R. 125), and he had a number of duties to perform. He had to flag traffic moving in all four directions to a stop (R. 16). While the train was passing over the crossing there was another train due out of Ravenna, Ohio, which was travelling in a westerly direction which

was known as the Detroit steel train, and Petitioner had to face the train and look to the north to see if the other train was approaching before clearing the crossing to let traffic through the intersection (R. 17-18) (R. 126). He also had to look for hot boxes on the train which was passing over the crossing and he was required to signal the conductor if he discovered any hot boxes (R. 114). While standing in this position he necessarily had to have his back to traffic on both highways west of the tracks and he was unable to see traffic on Home and Tallmadge Avenues west of the tracks (R. 18). Just as the caboose reached the crossing, an automobile on Home Avenue "jumped the gun" and without any signal or warning started up and made a left hand turn onto Tallmadge Avenue (R. 68) and struck petitioner before he had a chance to face traffic (R. 18).

The Court submitted the case to the jury on well established principles of railroad law and the jury returned a verdict in favor of the petitioner and assessed his damages in the sum of \$25,000.00 (R. 240). Before it could return the verdict, the jury was required to find that the respondent was negligent in failing to use ordinary care to provide the petitioner with a reasonable safe place to work under the circumstances aforesaid (R. 202).

In addition thereto, the jury answered two interrogatories submitted to them at the respondent's request, which are as follows:

No. 1. Do you find that the defendant was negligent?

Answer: "In Part."

No. 2. If your answer to question No. 1 is in the affirmative, state of what said negligence consisted.

Answer: "Not providing enough protection." (R. 239.)

The trial court accepted the verdict of the jury and entered judgment thereon. Upon appeal, the Court of Appeals for Summit County, Ohio, reversed the judgment and rendered final judgment for respondent. The Supreme Court of Ohio refused petitioner's motion to Certify the Record and denied rehearing.

ARGUMENT.

I. Did the Court of Appeals of the State of Ohio err in holding as a matter of law that the evidence adduced does not show any negligence of respondent, and does not permit the inference, or authorize the jury to infer, that the respondent was negligent as charged and submitted?

Inasmuch as this matter is before this Court because of petitioner's claim that the opinion of the Court of Appeals for Summit County, Ohio, is erroneous, we deem it our duty to point out the errors into which the State Court fell.

The State Court of Appeals overlooked certain material facts established by the evidence in proceeding on the theory "there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff" (R. 255).

Sam Bailey, a witness to the accident, was well aware of the disregard for signals on the part of vehicular drivers and of their habit of "jumping the gun" at this intersection. He testified (R. 68):

"A. I had stopped for the train and the train was just about to clear the crossing. I believe the cab was coming over the crossing at the time. *This car, like a lot of them I seen there, jumping the gun,* seen the tail end of the train coming up went around the cars, this car came around several cars that was on Home Ave-

nue and turned west on Tallmadge Avenue and hit the watchman."

The defendant could foresee the possibility that, a driver of a motor vehicle would disregard the crossing signals, "jump the gun" and make a left hand turn from Home Avenue to Tallmadge Avenue. Other drivers had previously done so.

The overlooking of the material facts above mentioned leads to a nullification of the effect of the controlling line of Supreme Court decisions.

Both Home and Tallmadge Avenues were heavily travelled both in daytime and at night (R. 103). It was the duty of the petitioner, while the eastbound train was passing over the crossing, to look for other trains approaching the crossing (R. 126). Between two hundred and two hundred and fifty feet north of Tallmadge Avenue the tracks curve to the right and then to the left (R. 20). The Detroit steel train which had left Ravenna, Ohio, about fifteen minutes before petitioner went out to flag the eastbound train was due over the crossing and petitioner had been looking for that train to approach (R. 17).

Raymond B. Peterson, the conductor on the train and a witness for the defendant, was well aware that petitioner's duties required him to face the train with his back to traffic, while the train was passing the intersection. He testified (R. 114):

"Q. You say it was the watchman's duty to keep watching your train as it went by to see if there were any hot boxes or anything wrong with your train and if there was he'd give you a signal? That's customary?
A. That's customary, other duties permitting he is generally required to do that.

Q. He had watched trains you had been on? A. Yes, sir.

Q. And if he saw something wrong he'd give you a signal? A. That's right."

Petitioner testified (R. 16):

Q. Any reason you went west of the westbound tracks? A. That was instructions, an eastbound train, a train going east the flagman should be on the west side of it so he can see if there's anything coming on the westbound.

Q. Who gave you those instructions? A. For one, Mr. Gamble, when he was instructing me about flagging up there because I had never done any flagging on the railroad.

Q. What was Mr. Gamble's capacity with the railroad? A. Crossing watchman.

Q. And what did you do when you got to the center of Tallmadge Avenue? A. By the time I got there the train was almost close enough—I had to look at traffic all four ways, if there was room I let two or three cars go through, if there wasn't I blew my whistle, turned my lantern so each one could see it, this shield on it, it's a fourteen inch shield. (R. 16.)

Q. Which way did you face then after the train started to pull across the crossing? A. After the crossing was blocked you have reference to? (R. 17.)

Q. Yes. A. I looked at the train. I looked away, that time, until I could see where the caboose was, then I had to look north towards Cuyahoga Falls to see if I could get a reflection, that was looking over my left shoulder. (R. 17.)

Q. What was your reason for looking toward Cuyahoga Falls? A. One to see if there was a reflection of a headlight coming around the curve. I couldn't see the light down at Evans Avenue. (R. 17.)

Q. Why couldn't you? A. The eastbound train was blocking it. (R. 17.)

Q. Now, while you were standing facing the way you were, were you able to see traffic back on Home Avenue at that time? A. No. (R. 18.)

Q. Were you able to see traffic that was west of you that was going east? A. No. (R. 18.)

Q. Now after you were looking north, or left, to

watch for this Detroit steel train what, if anything, did you do? A. In regard to what?

Q. As the caboose was approaching the intersection what did you do? A. I turned my head real quick to the right and—

Q. Looking toward where?

A. Evans Avenue, and saw I couldn't see that light.

Q. All right. And then what happened, tell the jury in your own words, what happened?

A. I turned my head to look towards Cuyahoga Falls, that would be north, and I was watching for a train to come around there before I'd clear the crossing to let traffic through, *and just as the caboose got up on the crossing I went to make just a step backwards and a turn, and that's when I got hit.* From then on I didn't remember anything.

Q. Had you signalled traffic forward? A. No sir." (R. 19.)

In the instant case the jury was justified in finding that the method of performing his work required a division of petitioner's attention; that he was thrust into an unsafe place to work, in the night season, in the intersection of two of the heaviest travelled and most dangerous traffic arteries in the State of Ohio, where a lot of other cars had "jumped the gun" and where petitioner, while performing his work was struck before he could face traffic. Petitioner was no Janus bearing two faces and able to look in both directions at the same time.

The automobile which struck petitioner had been stopped on Home Avenue (R. 84) about 60 to 70 feet away from the point where petitioner was standing at the time he was struck (R. 37). Vehicles traveling on Home Avenue had the right to, and often did turn left into Tallmadge Avenue where both highways converge west of the defendant's trucks. The jury could reasonably infer that had

petitioner, in the performance of his duties been permitted to face vehicular traffic, he might well have jumped, dived, moved or done anything else in order to save himself from being struck; *that because the petitioner's multiple duties divided his attention the importance of the automobile driver's conduct was enlarged.*

To use the language of Mr. Justice Brennan in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 503:

"These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did."

Paraphrasing the language of Mr. Justice Douglas in the case of *Gray v. Central Vermont R. Co.*, 319 U. S. 350,

"* * * These were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing the petitioner with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence * * *. To withdraw such a question from the jury is to usurp its functions."

Clearly the state court in the instant case, in reaching its conclusion that the evidence failed to show negligence on the part of respondent improperly reweighed the evidence and came to an independent conclusion thereon in conflict with the findings of a fully and properly instructed jury. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29. *Wilberson v. McCarthy*, 336 U. S. 53.

2. In an action under the Federal Employer's Liability Act, 45 U. S. C. 51 et seq., where the employer sent an employee as a crossing watchman, in the night season, to stand directly in the intersection of two heavily traveled highways, immediately west of its railroad tracks, which crossed both highways diagonally at the intersection, and the employee's duties required him to face the train, with his back to traffic as the train was passing over the crossing, thus creating a likelihood that the employee might be struck by a vehicle of a third party, which in fact occurred, can the state court say as a matter of law that there was no actionable negligence?

The Issue of Negligence Was for the Jury.

The jury had before it sufficient probative facts to sustain its verdict for petitioner. The State Court of Appeals deprived him of his constitutional right to a trial by jury when it reversed the trial court judgment and the verdict of the jury and directed entry of final judgment for the railroad.

The standard to be applied in reviewing the sufficiency of the evidence in cases arising under the Federal Employers has been enunciated in the recent decision in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, where the court said, at pages 506, 507:

"Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to a single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

The case of *Schulz, Administrator v. Pennsylvania R. Co.*, 350 U. S. 523, 525, 526, decided by this Court on April 9, 1956, states:

"In considering the scope of issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre, but measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others'. *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888)."

Near its conclusion the opinion holds:

"Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

The following decisions have consistently given recognition to the pronouncement enunciated in the *Rogers* case. See also *Webb v. Illinois Central R. Co.*, 352 U. S. 512; *Shaw v. Atlantic Coast Line R. Co.*, 353 U. S. 920; *Futrelle v. Atlantic Coast Line R. Co.*, 315 U. S. 920; *Deen v. Gulf, C. & S. F. R. Co.*, 353 U. S. 925; *Thomson v. Texas & Pacific R. Co.*, 353 U. S. 926; *Arnold v. Panhandle & S. F. R. Co.*, 353 U. S. 360; *Ringhiser v. Chesapeake & O. R. Co.*, 354 U. S. 901; *Moore v. Terminal R. Assn. of St. Louis*, 79 S. Ct. 2.

3. In an action under the Federal Employer's Liability Act, can it be said that where the employee is struck by an automobile driven by a third party, that defendant must be exculpated, as a matter of law, because the automobile driver violated traffic statutes or ordinances?

The opinion of the State Court of Appeals frankly holds that the respondent had the right to rely on traffic rules and regulations relating to the conduct of a third party or stranger; that the respondent in the performance of its duty to its own employee was not required to anticipate negligence on the part of such third person in non-observance of these rules. This is, in fact, the basis of the decision.

The automobile driver's negligence no more relieved this defendant from its obligation than did the criminal act of a third party relieve the defendant in *Cahill v. New York, New Haven & Hartford R. Co.*, 350 U. S. 898 (1956) reversing 224 F. (2d) 637; *Smalls v. Atlantic Coast Line R. Co.*, 348 U. S. 946 (1955), reversing 216 F. (2d) 842. In *Lillie v. Thompson*, 332 U. S. 459 (1957), the Court said at page 462:

"That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

This Court in *Cahill v. The N. York, N. Haven & Hartford Railroad Co.*, *supra*, 350 U. S. 898 (1956), in reversing the Second Circuit, 224 F. (2d) 637, impliedly sanctioned the views expressed in the minority opinion of the Circuit Court which were in part as follows:

"My colleagues' opinion seems to me to amount to saying that, as a matter of judicial notice, such a man could not have jumped to safety when a truck, which had been stationary, four feet away, started in motion. With that position I do not agree. A truck cannot leap forward from rest like a greyhound or a modern sport-model passenger automobile. I think that we cannot hold that a jury acted unreasonably in believing that an agile young man could not here have rescued himself, had he been looking directly at the truck when it began to move towards him.

Nor do I agree that the defendant must be excused because the truckdriver's conduct was criminally negligent or reckless. Since such drivers are part of the facts of life, as police records demonstrate, defendant owed plaintiff a duty to train him to take such behavior into account. Such an 'intervening' factor does not exculpate in such circumstances."

In the *Cahill* case, *supra*, the charge of negligence was that defendant failed to instruct the plaintiff, new at the particular job, not to turn his back on the motor traffic. In the instant case, because of his multiple duties, plaintiff necessarily had to have his back to motor traffic.

In the case of *Smalls v. Atlantic Coast Line R. R. Co.*, 348 U. S. 946, the Court reversed *per curiam* without opinion the decision of the Court below: The facts are taken from the opinion of the Court of Appeals, 216 F. 2d 842. The plaintiffs were standing at a railroad crossing waiting to be picked up by one of the railroad's trains for transportation to a safety meeting sponsored by the railroad. Attendance at the meeting was voluntary, but encouraged. While waiting for the train, plaintiffs were struck by an automobile driven by a person having no connection with the defendant railroad. The plaintiffs contended that the railroad had not provided them with a safe place to work in that the crossing was not lighted.

A judgment for plaintiffs on a jury verdict was reversed by the Court of Appeals, on the ground that there was no evidence that the defendant was negligent.

The decision of the State Court of Appeals is contrary to the holdings of the Supreme Court and is at variance with current legal opinion throughout the country.

In *Restatement of the Law 2, Torts, Negligence*, Section 449 it is said:

"If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

In the same connection, and upon the question of foreseeability, we find in *Shearman & Redfield on Negligence*, 6th Ed., Vol. 1, section 38 A, the following:

"The familiar position that one is ordinarily under no obligation or duty to foresee or anticipate the negligence of another has no application. It is merely a question of fact for the jury."

See also *Restatement of Torts*, Section 290, a., and comment b; Section 302 b., and comments c., i., j.

There is scarcely a mile of highway in the whole country, that is not monumented with violation of traffic laws. Keeping the administration of law in reasonable nearness to the realities of life and social facts we cannot blind ourselves to actual conditions we know exist,—to the experience flooding in upon us every day through press, radio, and the medium of our own eyes. Neither can the respondent. In the exercise of ordinary care for the protection of its employee, the petitioner, it was the duty of the respondent to take into consideration those dangers which are within every day experience, from whatever source

they come, and make such provision against them as ordinary prudence requires.

This Court said in the case of *Ferguson v. Moore-McCormack Lines Inc.*, 352 U. S. 521 in its opinion:

"It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident."

4. The decision of the Court of Appeals in the instant case that the negligence of the defendant must be the "proximate cause" in the common law sense, in these Federal Employer's Liability Act cases, is in direct conflict with the latest decisions of the United States Supreme Court.

The opinion of the State Court of Appeals in deciding that "The basis for recovery by an injured employee under the Federal Employer's Liability Act is therefore negligence of the employer in failing to provide a safe place for the employee to work, which negligence proximately causes, in whole or in part, the injuries of which complaint is made," is to be interpreted as meaning that the negligence of the carrier, in addition to being responsible in part for the injury, must also be the "proximate cause" of such injury in the common law sense before liability attaches. For this proposition, it cited 29 *Ohio Jurisprudence*, Negligence, Sec. 68 (R. 250-251).

The decision clearly contravened § 51 of the Federal Employer's Liability Act which establishes liability for injury resulting, in whole or in part, from the negligence. That the negligence of a common carrier as an employer need not be the "proximate cause" in the common law sense but need only be the slightest cause, in order to establish liability under the Federal Employer's Liability

Act, is illustrated by the decision of this Court in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506, where the court said:

"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. * * * The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence."

5. Implicit in the jury verdict is a finding that respondent could have anticipated, or foreseen that petitioner, in performing the duties required of him, would suffer just such an injury as he did. In reversing, the State Court of Appeals refused to respect that finding and thereby deprived petitioner of his right to trial by jury given to him by the Federal Employer's Liability Act.

The trial judge did charge that one of the elements the jury should consider was whether respondent should have reasonably anticipated or foreseen the act or acts which caused petitioner's injury (R. 203-5). The State Court of Appeals refused to accept the jury's affirmative answer to that question and substituted its own finding for that of the jury, in holding that the occurrence was not within the realm of reasonable "foreseeability"; it thereby usurped the jury's function and deprived petitioner of the right to trial by jury given to him under F. E. L. A.

The jury was carefully instructed, that if petitioner's injury resulted solely from the negligence of James Ball,

the operator of the automobile which struck him, the verdict should be for respondent (R. 208).

The jury was properly instructed upon the issue of respondent's negligence and its effect if it had any part in producing petitioner's injury (R. 204).

The jury was further carefully instructed as to its verdict if it should find that petitioner's injury resulted from his own acts and conduct (R. 206).

The jury was further carefully instructed as to the effect of the combined and concurrent negligence of both respondent and the driver of the automobile which struck petitioner (R. 208).

CONCLUSION.

The judgment of the State Court of Appeals for Summit County, Ohio, should be reversed and the judgment of the trial court should be reinstated.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 36.

CARL C. INMAN,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OHIO.

Petition for Certiorari Filed February 24, 1959.
Certiorari Granted April 6, 1959.

BRIEF FOR THE RESPONDENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 36.

CARL C. INMAN,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OHIO.**

**Petition for Certiorari Filed February 24, 1959.
Certiorari Granted April 6, 1959.**

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

Since the filing of petitioner's brief, the opinion of the Court of Appeals, Ninth Judicial District of Ohio, has been reported in 108 Ohio App. 124, 32 Ohio Bar No. 35.

STATUTES INVOLVED.

In addition to the statutes referred to by petitioner (Petitioner's Brief, p. 2), the following statutes of the State of Ohio are involved in this case and are set forth in an Appendix to this brief at pages 35-36:

Ohio Gen. Code Sec. 6307-20 (now Ohio Rev. Code Sec. 4511.20);

Ohio Gen. Code Sec. 6307-30 (now Ohio Rev. Code Sec. 4511.30);

Ohio Gen. Code Sec. 6307-35 (now Ohio Rev. Code Sec. 4511.36);

Ohio Gen. Code Sec. 6307-38 (now Ohio Rev. Code Sec. 4511.39);

Ohio Gen. Code Sec. 6307-42 (now Ohio Rev. Code Sec. 4511.43).

QUESTIONS PRESENTED.

1. By pleading a cause of action under the Federal Employers' Liability Act, does the plaintiff acquire an absolute right to have issues submitted to a jury, unfettered by any judicial review of the evidence offered in support of his cause?

2. Does the plaintiff establish a prima facie case under the Federal Employers' Liability Act by showing that while on duty as a grade crossing watchman he was struck and injured by a reckless and drunken hit-and-run driver?

STATEMENT OF THE CASE.

The petitioner's Statement of the Case and his Questions Presented contain statements of fact and conclusions not supported by the record. For this reason we give a statement of facts supported by the evidence contained in the record.

This case involves injuries to petitioner, a railroad crossing watchman, who was struck by a reckless and drunken hit-and-run driver at a grade crossing in the City of Akron, Ohio, on January 2, 1952, at about 12:00 A. M. Petitioner brought an action in the Court of Common Pleas, Summit County, Ohio, under the Federal Employers' Liability Act, 45 U. S. C. Sec. 51 *et seq.*, alleging that, while performing his duties for respondent, he was standing on Tallmadge Avenue at a point where said street was intersected by Home Avenue just west of respondent's tracks.

when he was suddenly and violently struck by an automobile being driven in a northeasterly direction on Home Avenue and making a left-hand turn into Tallmadge Avenue; and as a result of being so struck, petitioner sustained certain disabling personal injuries. Petitioner alleged that respondent negligently and carelessly:

ordered and directed (petitioner) to perform his duties as a flagman at said crossing, when it was impossible for him to observe vehicles entering said intersection from Home Avenue and without taking any measures to prevent him from being struck, as aforesaid;

failed to place another employee at said crossing to watch for other trains approaching said crossing, while (petitioner) was on duty flagging, to the end that (petitioner) could keep a look-out and watch for traffic proceeding from Home Avenue into said intersection, and particularly the vehicle that struck (petitioner) as aforesaid. (R. 3.)

Respondent, while admitting that petitioner was struck by an automobile and sustained some personal injuries, denied that such injuries were of the nature and character alleged, and denied that it was in any manner negligent.

The physical characteristics of the crossing are important in the consideration of this case and warrant a rather detailed description. At this crossing, known as "Bettes Corners," Tallmadge Avenue, a main thoroughfare running east and west, was intersected by Home Avenue, running in a slight northeasterly-southwesterly direction. Three railroad tracks of the respondent extended through the intersection of these two streets in a slight northwesterly and southeasterly direction. The most easterly track was a side or switch track, the middle was

the east bound main track, and the most westerly was the west bound main track (Joint Ex. A; R. 160, 234). The photo-offset reproduction on the opposite page, which is a copy of the central portion of Joint Exhibit A, slightly reduced in size, is presented here to show more graphically to the Court the physical layout of this crossing and the intersection of Tallmadge and Home Avenues.

As shown by this exhibit, there was but one intersection of Tallmadge Avenue and Home Avenue, notwithstanding petitioner's statements to the contrary at pages 3 and 4 of his brief.

All street approaches to the railroad crossing were protected by highway warning signals, commonly known as "flasher lights." Located to the east of the side track and south of Tallmadge Avenue was a watchman's shanty, where the railroad crossing watchman would stay when he was not flagging for approaching trains, and where his special equipment, consisting of lamps, stop signs, fusees, torpedoes, etc., was kept (R. 41). There was also a listening phone in the shanty connected with the nearby XN Tower so that the watchman could hear the dispatcher issuing orders and giving the location of various trains (R. 47). A "tell-tale" flashing light inside the shanty gave the watchman notice of an approaching train (R. 14). Outside the shanty there was a similar flashing light to give notice of approaching trains, which light was located on a 25-foot pole near the south curb of Tallmadge Avenue, east of the crossing (R. 120).

The electrical circuits controlling these signals were so arranged that the "tell-tale" flashing lights in and outside the shanty commenced operation when an eastbound train was 2,066 feet from the crossing, and when a westbound train was 3,455 feet from the crossing (R. 119-121).



EAST TO
CUT FALLS
PITTSBURG

WEST TO
HAYDEN WILLARD

NORTH RAILROAD

TALLMADGE

Pavement Widening
in October, 1952



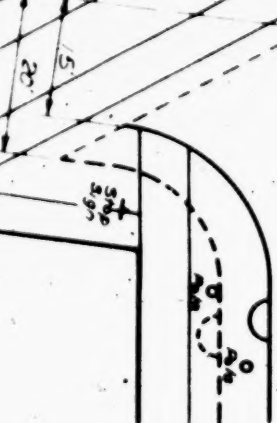
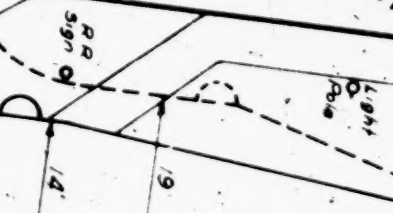
Pavement Widening
in October, 1952



AVE.

HOME

CO.



either direction was about 2,000 feet from the crossing. Both the flashers and the "tell-tale" lights continued to function until the respective trains had cleared the crossing by 75 to 105 feet (R. 120, 131). There was also a standard railroad block signal located to the south of the crossing on a mast 27 feet high, by which the watchman could determine when any westbound train was within 3,455 feet of the crossing (R. 119, 122).

Kodachrome exposures taken by Fred Tambling, a commercial and industrial photographer (R. 132, 141-143; Dft. Ex. E, F, G, H, I; R. 160, 227-231), and the testimony of D. T. Kingsley, a licensed surveyor (R. 185, 187), showed that the block signal located on the railroad right-of-way could be clearly seen by a person standing in the middle of Tallmadge Avenue 2-3 feet west of the westbound track (the place where petitioner testified he was standing) when the rear of an eastbound train was no more than 134 feet south of the crossing.

All of the signals described were inspected before and after the accident and were found to be in perfect working order (R. 123).

For Home Avenue traffic approaching from the south, there was one standard highway stop sign near the flasher lights before reaching the tracks and another after passing the tracks, directly at the intersection of Tallmadge Avenue, a main thoroughfare (R. 56). There was a City street light on a pole about 25-30 feet west of the tracks on the south side of Tallmadge Avenue, which had a shield to direct the rays downward on to the street (R. 31, 52).

At the time of the accident on January 2, 1952, the petitioner had been employed by The Baltimore and Ohio Railroad Company as a crossing watchman for about seven

years, and had been working the 11:00 P. M. to 7:00 A. M. shift at the "Bettes Corners" crossing for about three years (R. 12). He was thoroughly familiar with the crossing, with his duties and with the Company rules governing the work in which he was engaged (R. 41-42).

Shortly after midnight, the "tell-tale" lights at the watchman's shanty and the highway flashers began flashing, indicating the approach of an east-bound train. As was his duty and custom upon the approach of an east-bound train, the petitioner left the shanty and stationed himself in the center of Tallmadge Avenue, about 2-3 feet west of the west bound tracks. Petitioner was carrying a whistle and lighted red and green lanterns. The night was cold but clear and the pavement was dry (R. 16). When the train "got close enough" to the crossing, the petitioner blew his whistle and began swinging the red lantern which he held in his right hand to stop traffic, first on Tallmadge Avenue, then on Home Avenue, making sure that all vehicles saw the signal (R. 48-49). The crossing was well lighted and he was standing in the rays of one of the City's lights located on the southwest corner of the crossing (R. 55; Pl. Ex. 14; R. 76, 217). Though petitioner, at page 4 of his brief, would have this Court believe that, in this position, he was "directly in the intersection of Tallmadge and Home Avenues," the fact is that he was standing near the centerline of Tallmadge Avenue, about 50 feet west of the point of intersection of the center lines of the two streets. (See copy of Joint Exhibit A, *supra*, opposite page 4; Joint Exhibit A, R. 234.) Projecting the westerly curb line of Home Avenue, it is clearly seen that petitioner was standing about 40 feet west of the westerly limit of the intersection and about 140 feet from the point where the first of the northbound vehicles on Home Avenue was stopped.

As the eastbound train, consisting of a steam engine, 80 empty gondola cars and a caboose (R. 107-109), passed over the crossing, petitioner was standing in the middle of Tallmadge Avenue about 2-3 feet west of the westbound track. The gondolas were open-top equipment and no higher than 7-8 feet above the top of the rails (R. 109). Petitioner testified that "just as the caboose got upon the crossing" he took a step backwards with his right foot and as he turned he was struck by an automobile being driven by a person later identified as James Ball (R. 18). Petitioner further stated that before he was hit, he got a "glimpse of the caboose" which was on the paved portion of the crossing by about 10-15 feet (R. 60); and he admitted that he had seen the caboose up the track when it was about 100 feet south of the crossing and that there were no cars behind the caboose (R. 61).

Sam Bailey, one of the several persons who saw the Ball automobile hit and knock down the petitioner, was in the first car in the line of east bound traffic stopped on Tallmadge Avenue west of the crossing. His driving lights were shining on petitioner who was standing directly in front of his car (R. 67, 69, 74). Bailey admitted the truth of his statement made the day after the accident (Dft. Ex. A; R. 80, 121, 360), wherein he stated: "After the caboose of the north-bound train passed the crossing, the watchman began to walk towards his shanty walking in a southeasterly direction but he was struck by this Plymouth sedan when he was on the running track and near the curb line * * *" (R. 71). Ball's car made a sharp left turn to the left of the railroad tracks and cut in front of Bailey's car where it struck petitioner (R. 72). Bailey stated he had no difficulty seeing these things happen for all the headlights were on (R. 73).

John Martin, another eye witness, also was stopped at the crossing on Home Avenue headed north. He testified that as the train was clearing the crossing the second car in front of him pulled out of the line of traffic, passed the cars ahead of it, and with tires squealing, sped towards the crossing in the southbound traffic lane (R. 98). In describing the path of Ball's car, Martin stated "He (Ball) went up to the tracks, about to the tracks, he may have got on the first track, up close, he made a quick left turn" (R. 99). Martin saw the petitioner, with red and green lanterns in his hands, on the west side of the tracks in the middle of Tallmadge Avenue and remembered seeing him take a few steps forward, or east, towards the shanty (R. 99, 100). Martin stated that as Ball's car started to make the left turn, the car came to a quick stop, "maybe not a dead stop," then the car took off again with the tires squealing (R. 100). He stated that the first car on Tallmadge Avenue headed east had its headlights on, and just as the "hit-skip driver" was making his left turn, Martin saw the front end of this car on Tallmadge Avenue go down from putting on the brakes (R. 101). Martin further testified that petitioner at the time he was struck, was towards the south side of Tallmadge Avenue (R. 101, 104).

Charles Feathers also saw Ball's car leave the line of traffic waiting on Home Avenue south of the crossing, and approach the crossing in the south bound traffic lane. Feathers testified that Ball "left the line of traffic and took off like he was in a hurry to go somewhere, took off fast, pulled out of the traffic and went to make a left hand turn on Tallmadge Avenue, headed west" (R. 86). Ball, shown by uncontradicted evidence to have been under the influence of alcohol (R. 84), made a left turn on the pavement west of the westbound track. Feathers, too, heard the spinning of Ball's tires, (R. 86), and he stated that, to

the best of his memory, petitioner, before he was struck, took two or three steps south on Tallmadge Avenue (R. 90, 91).

Raymond B. Peterson, the flagman on the train, was standing on the rear platform on the caboose facing west as the train passed over the crossing. He saw petitioner and then turned with his back to the caboose facing in a southerly direction, the caboose at this instant being on the crossing (R. 111). Through his side vision, he saw the automobile and he stated: "I turned because it looked to me like it was close and as soon as—I no more than turned my head until the automobile struck him" (R. 111). Peterson testified that petitioner was about 10 feet from the south curb of Tallmadge Avenue when he was struck and the caboose had just cleared the crossing (R. 112). Peterson had no difficulty seeing the petitioner and the red and green lanterns in his hands which were knocked to the ground when petitioner was struck (R. 113).

It is undisputed that from the time that Ball pulled out of the line of traffic until he struck the petitioner, Ball violated the five Ohio traffic statutes set forth in the Appendix to this brief at pages 35-36. Although petitioner had worked for three years continuously as night watchman at this crossing, he offered no testimony that either he or any other watchman at this crossing had ever been endangered by any motorist and offered no testimony of any occurrence like or similar to the unlawful conduct of James Ball.

Petitioner, at page 4 of his brief, makes the amazing statement that "vehicles approaching from the southwest on Home Avenue had the right to and did often turn left into Tallmadge Avenue where the two highways converge along the most westerly track of railroad," and refers to certain photographs (Pl. Ex. 5, R. 214; Dft. Ex. E, R. 227;

Joint Ex. R, R. 236) as support therefor. Petitioner makes a similar statement at page 9 in his Argument. Such statements are wholly without any basis in the record. Not only was there no evidence whatever as to any "right" on the part of such motorists to make a left turn into Tallmadge Avenue through the area west of respondent's west-bound track, these statements by petitioner fly in the face of Ohio Gen. Code Sec. 6307-35 (see Appendix), which provides the manner in which left turns shall be made in the State of Ohio. Furthermore, there was not a syllable of evidence offered into the record which would even suggest that any motorist proceeding north on Home Avenue, other than the drunken James Ball, had ever made such a left turn in that area.

The trial of the case resulted in a verdict for plaintiff in the amount of \$25,000.00, with the entry of judgment thereon in his favor.

On appeal to the Court of Appeals of Ohio, Ninth Judicial District, respondent urged that error prejudicial to its rights had intervened in the trial of the case, as related in its Assignments of Error (R. 246-248). The Court of Appeals reversed the judgment of the trial court and entered final judgment for respondent, holding that the verdict and judgment of the trial court were not sustained by any probative evidence. The Court of Appeals also ruled that the trial court had committed prejudicial error in its rulings on certain instructions to the jury requested by respondent and in its general charge to the jury, each of which errors would have required a new trial (Opinion, Court of Appeals, R. 248-258; Journal Entry, Court of Appeals, particularly subdivisions (c) through (h), inclusive, thereof, R. 259-261).

In the Supreme Court of Ohio, after the filing of briefs and oral argument, the petitioner's motion to certify the

record was denied and his appeal as of right was dismissed. Thereafter, his application for rehearing was denied (R. 264, 266, 267).

Petitioner, on February 24, 1959, having filed his Petition for Writ of Certiorari, this Court on April 6, 1959, granted Certiorari and ordered the case transferred to its Summary Calendar.

ARGUMENT.

THE COURT OF APPEALS OF OHIO, BY DECIDING THAT THE VERDICT IN FAVOR OF PETITIONER AND THE JUDGMENT RENDERED THEREON WERE NOT SUSTAINED BY ANY PROBATIVE EVIDENCE, DID NOT DEPRIVE PETITIONER OF ANY OF HIS CONSTITUTIONALLY PROTECTED RIGHTS.

1. **Petitioner, by pleading a cause of action under the Federal Employers' Liability Act, does not thereby acquire an absolute right to have the case submitted to a jury.**

On the appeal of this case to the Court of Appeals, respondent asserted that the trial court prejudicially erred in overruling respondent's motion for a directed verdict and for judgment at the close of all the evidence and in overruling its motion for judgment notwithstanding the verdict, and also asserted other prejudicial errors which would require a reversal and remand for new trial. The Court of Appeals found that the verdict and judgment rendered thereon were not sustained by any probative evidence, and, accordingly, entered final judgment in favor of respondent. Certain other prejudicial errors were found by the Court of Appeals to have occurred on the trial of the case, which errors required a reversal of the judgment and would have required an order of remand for a new

trial had the Court of Appeals not entered final judgment for respondent.

Petitioner appears to be of the erroneous impression that by merely pleading a purported cause of action under the Federal Employers' Liability Act, he thereby acquires an absolute and inalienable right to have the issues drawn by the pleadings submitted to a jury. He claims that he has been deprived of this "right" because the Court of Appeals examined the record to determine whether there was any evidence to support his cause.

Despite any contrary illusions which the petitioner may hold, there is no law which permits any plaintiff to recover damages upon mere allegations of negligence without proof to support them. The right of a plaintiff to have a jury decide his case arises only when evidence is produced to sustain his claim.

At the time of the adoption of the Seventh Amendment to the Constitution, the common law had, for centuries, prescribed the functions of a jury in the determination of issues of negligence and proximate causation. Credibility of witnesses, the weight and probative value of evidence, as well as reasonable inferences to be drawn therefrom, have consistently been held to be matters for determination by the jury. However, before a particular case is submitted to the jury, there may be, as there was in the instant case, a preliminary question for the determination of the trial court: whether there is any evidence upon which the jury can properly proceed to find in favor of the party upon whom the burden of proof is imposed.

This Supreme Court has uniformly held down through the years that the determination of this preliminary question by the trial court or appellate court does not constitute an invasion of the province of a jury, nor does it

deprive a plaintiff of his constitutionally or otherwise protected right to a trial by jury.

In *Commissioners of Marion County v. Clarke*, 94 U. S. 278, 284 (1877), Mr. Justice Clifford, speaking for the Supreme Court, stated:

Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. * * *

And in *Baltimore & Ohio R. Co. v. Groeger*, 266 U. S. 521, 524 (1925), Mr. Justice Butler stated:

(M)any decisions of this Court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.

See, also, *Coughran v. Bigelow*, 164 U. S. 301, 307 (1896); *Gunning v. Cooley*, 281 U. S. 90, 94 (1930); *Galloway v. U. S.*, 319 U. S. 372, 389 (1943).

Furthermore, it has been declared that this duty imposed upon trial judges applies with equal vigor to state courts in cases arising under the Federal Employers' Liability Act. *Chicago, M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, 474 (1926); *Gulf, M. & N. R. Co. v. Wells*, 275 U. S. 455, 457 (1928); *Tololo St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 168 (1928); *Western & Atlantic R. Co. v. Hughes*, 278 U. S. 496, 497 (1929). And in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479 (1943), this Court stated:

The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the

case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims.

In the instant case, the separate motions of respondent, for a directed verdict made at the close of all the evidence, and for judgment notwithstanding the verdict, raised the legal question of whether petitioner, upon whom rested the burden of proof of the alleged negligence of respondent, had produced sufficient evidence to create a jury issue as to such alleged negligence. Here, as in *Eckerd v. Pennsylvania R. Co.*, 335 U. S. 329, 330 (1948), this question was before the court:

Was there any evidence in the record upon which the jury could have found negligence on the part of respondent which contributed, in whole or in part, to (petitioner's injuries).

The standard to be applied by a court in reviewing the sufficiency of the evidence in cases arising under the Federal Employers' Liability Act has been more recently enunciated in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), wherein the Court said, at pages 506, 507:

Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

Subsequent decisions have consistently followed and cited this pronouncement from the *Rogers* case. *Arnold v. Panhandle & Santa Fe R. Co.* 353 U. S. 360 (1957); *McBride v. Toledo Terminal R. Co.*, 354 U. S. 517 (1957); *Gibson v. Thompson*, 355 U. S. 18 (1957). The statement gives recognition to certain fundamental principles which the petitioner would have ignored. First, there must be *proof* (as distinguished from theories or allegations) of negligence. Second, the proof offered must justify the reasonable conclusion that negligence of the employer played *some* part in the injury. Third, there must be some *judicial* appraisal of the proofs. While, on this judicial appraisal of the proofs, the evidence is viewed in a light most favorable to the party upon whom the burden of proof rests, this Court has declared that in cases under the Federal Employers' Liability Act "speculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio R. Co.*, 340 U. S. 573, 578 (1951). See also *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 559 (1957) (separate opinion of Harlan, J.).

As will be demonstrated by respondent in Subdivision 2 of Argument, the record of this case contains no probative evidence upon which a jury could properly and reasonably conclude that the alleged negligence of respondent played any part in causing petitioner's injuries. The Court of Appeals, in its appraisal of the proofs offered in this case, scrupulously followed these principles, and in so doing reached the only reasonable conclusion possible, *i.e. that there was no negligence on the part of respondent*. There was neither evidence of any failure on the part of respondent to furnish petitioner with those safeguards required by the exercise of ordinary care, nor evidence of any prior occurrence of the kind involving petitioner which would

put respondent on notice of likelihood of danger to one in his position.

Neither the provisions of the Seventh Amendment to the Constitution, nor those of the Federal Employers' Liability Act provide an absolute right to have a case submitted to a jury. It was necessary for petitioner to meet the requirement of presenting "probative facts from which the negligence and causal relation could reasonably be inferred" before such issues could properly be submitted to the jury. *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 32 (1944). The Court of Appeals, in appraising the record within the limits of the mandate of the *Rogers* case, found that petitioner had failed to fulfill this requirement. Its reversal of the judgment of the trial court and the entry of final judgment for respondent was with complete legal justification and in conformity with the decisions of this Court.

2. Petitioner, by merely showing that while on duty as a grade crossing watchman he was struck by a reckless and drunken hit-and-run driver, has not established a prima facie case under the Federal Employers' Liability Act.

A. Liability under the Federal Employers' Liability Act is dependent upon proof of employer negligence.

When an employee brings an action for damages against a railroad under the Federal Employers' Liability Act, 45 U. S. C. Sec. 51 *et seq.*, that action is predicated on the alleged negligence of the railroad employer. While some might regard the applicable principles of law outmoded, the fact remains that Congress in enacting this legislation deliberately chose to make a railroad employer's

the cause of action under the Act is for negligence—the same cause of action for negligence as it developed under the common law. Except for certain defenses recognized by the common law which have been modified or abolished by the Act, as amended, in a Federal Employers' Liability Act case the same issues of negligence and proximate cause are present as in any other action for personal injuries based on alleged negligence. As the Supreme Court stated in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67 (1943):

The Act of 1908 and the amendment of 1939 * * * leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.

In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done. * * *

And as stated in *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 653 (1947):

The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury.

See also *Southern Ry. Co. v. Gray*, 241 U. S. 333, 338 (1916); *Urie v. Thompson*, 332 U. S. 163, 192 (1949); *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 537 (1957) (separate opinion of Frankfurter, J.); *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326, 333 (1958) (separate opinion

Since the basis of liability under the Act is negligence, that is, the failure to exercise ordinary care under the circumstances, an essential element in the determination of whether a person has failed to exercise such care, is foreseeability of the risk of harm. As was stated in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 483 (1943):

Events too remote to require reasonable provision need not be anticipated. * * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

None of the recent pronouncements of this Court contain any suggestion that liability under the Federal Employers' Liability Act is predicated other than on negligence. As stated by Mr. Justice Frankfurter, in his separate opinion in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 538 (1957):

The Court has never intimated that the concept of negligence, undefined in the statute, has some special or esoteric content as used in the Act or is anything other than a statutory absorption of the common-law concept.

In the instant case, the Court of Appeals, upon its appraisal of the proof offered, found that:

There is no evidence in this record of failure on the part of (respondent) to furnish (petitioner) with all of the safeguards in the performance of his work, which reasonably prudent operators of railroads furnish under like or similar circumstances. And there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of (petitioner).

That the (petitioner), while in the discharge of

the actions of a drunken driver, violating five traffic statutes and ordinances was not, in our opinion, such an occurrence as, under the evidence of this record, was reasonably foreseeable by (respondent).

There was, accordingly, no duty imposed on (respondent) to anticipate such an occurrence as eventuated, and, hence, no negligence for failure to guard against it. (Opinion of Court of Appeals; R. 255).

B. Only negligence which proximately causes, in whole or in part, injury to an employee is actionable under the Federal Employers' Liability Act.

This Court has consistently held down through the years since the enactment of the Federal Employers' Liability Act, that employer negligence, to be actionable, must be a proximate cause of the employee's injury. See *Southern Ry. Co. v. Gray*, 241 U. S. 333 (1916); *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7 (1929); *New York Central R. Co. v. Ambrose*, 280 U. S. 486 (1930); *Baltimore & Ohio R. Co. v. Berry*, 286 U. S. 272 (1932); *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67 (1943); *Brady v. Southern Ry. Co.*, 320 U. S. 476 (1943); *Ellis v. Union Pacific R. Co.*, 329 U. S. 649 (1947).

In the recent decision in the *Rogers* case, this Court stated:

Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

We submit that this pronouncement in the *Rogers* case leaves unchanged the concept of causation which has long prevailed in the law of negligence, for the word "produce."

Accordingly, the issue remains as before a question of whether the negligence of the employer caused, in whole or in part, the injury to the employee.

C. The record contains no evidence upon which a jury could properly and reasonably conclude that negligence of the respondent played any part at all in producing petitioner's injury.

It should be emphasized that there is no dispute whatever in this case as to the manner in which the petitioner was injured.

The warning devices installed by the railroad had given him ample notice of the approach of the train and he had been furnished with lamps and a whistle to stop highway traffic at the crossing. He was standing at a well-lighted crossing, and the street approaches to the crossing were all protected by operating flasher lights. Automobiles had been stopped for some time awaiting the passage of the train, and the headlights of these automobiles further illuminated the crossing and petitioner. Three waiting motorists gave uncontradicted testimony that petitioner was in plain sight at all times while on the crossing (Bailey, R. 67; Feathers, R. 90; Martin, R. 99). The caboose on the end of the eastbound train was approaching, and petitioner saw it when it was about 100 feet south of the crossing. There was no reason to anticipate danger to petitioner from any source.

What otherwise would have been a routine passage of a train over this crossing was all changed when suddenly a drunken driver pulled his automobile out of the line of northbound vehicles waiting on Home Avenue, passed several standing automobiles, came up to the crossing at a high rate of speed on the wrong side of the street, ignored the stop signs and the operating flasher lights,

made an illegal left turn before reaching the intersection of these two streets, struck and injured the petitioner and raced away from the scene. From the time this driver, James Ball, pulled out of the line of Home Avenue traffic until he struck down the petitioner, he violated the five Ohio traffic statutes quoted in the Appendix to this brief at pages 35-36.

Likewise, there is no dispute as to the fact that petitioner, the unfortunate victim of this drunken hit-and-run driver, James Ball, sustained injuries as a result of his being so struck. However, there is not a syllable of evidence from which the jury could conclude or infer that the respondent knew, or in the exercise of ordinary care should have known, that there was any likelihood of petitioner being endangered by the acts of any motorist waiting at this crossing, including James Ball, in particular.

The words "jumping the gun," used by the witness Bailey and quoted by petitioner in several places in his brief, interpreted most favorably to the petitioner, can mean nothing more than starting ahead of time. Those words cannot be interpreted to mean conduct in any respect comparable to that of James Ball, in pulling out of the line of waiting vehicles, driving on the wrong side of the street in violation of law, failing to stop at Tallmadge Avenue in violation of law, and turning left into Tallmadge Avenue at least 50 feet south and west of the place where a left turn could be made in conformity to law. Those words cannot be interpreted to mean that any motorist had ever before so operated an automobile at this crossing, or had been there guilty of any such violations of law.

Petitioner, by his designation of the testimony of Dr. Fowler Roberts for inclusion in the printed Record of this case, apparently is of the mistaken belief that such testimony lends credence to his case. While petitioner did

sustain injuries as a result of being struck by the motorist Ball, it is a well-settled rule that the mere fact of such injuries, however severe they might be, cannot give rise to liability under the Federal Employers' Liability Act. As stated in *New York Central R. Co. v. Ambrose*, 280 U. S. 486, 490 (1930):

* * * If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.

More recently, in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 484 (1943), this Court, in restating the rule, declared:

Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury.

Contrary to the statements which petitioner now makes in his brief at pages 4-5, the record clearly shows that he did not testify that he had any duty other than to warn highway traffic of approaching trains. He had stopped traffic, first on Tallmadge Avenue, then on Home Avenue, by swinging his lighted red lantern. The red flasher lights at all approaches to the crossing also signalled the approach of the eastbound train, and required all motorists to stop. The train, as it passed over the crossing, created an impassable obstacle to automobiles both headed west on Tallmadge Avenue and headed north on Home Avenue. Petitioner was not required to face the train to look for hot-boxes, notwithstanding the assertions made by petitioner to the contrary in several portions of his brief. Petitioner did not testify, nor did any company rule direct, that he was required to watch for hotboxes.

In an effort to offset the absence of any such evidence in the record, petitioner, at page 7 of his brief, dwells upon certain of the testimony of Raymond Peterson, a brakeman, not the conductor on this eastbound train. Peterson was not in any supervisory capacity with respect to petitioner. In extracting certain comments out of context, petitioner overlooks Peterson's further testimony, as follows:

Q. And so in order to see if there was anything wrong with your train, any hot boxes or anything else wrong with it he'd have to be looking in an easterly direction, wouldn't he?

A. Yes.

Q. If your train was east of where he was standing?

A. Well that may not be entirely necessary, he could look towards the south or the direction from which we were coming, and get a view of the side of the train at a distance.

Q. But in order to see the cars, hot box, that's something that takes place under the individual car, isn't it?

A. That's right.

Q. That's where the axle is?

A. Yes sir.

Q. So in order to get a good view of a hot box the best view would be when he's right alongside the car, wouldn't it?

A. No sir.

Q. That would be a vantage place, wouldn't it?

A. It would be.

Q. And in order to look this train over he'd have to be facing east, wouldn't he?

A. I said before, not necessarily.

Q. Or southeast, south and east?

A. Yes sir.

Q. Now he's supposed to do that if his duties permit. Of course he had other duties at that crossing?

A. He has traffic to keep.

Q. What about watching for other trains that come from the west going east while he's out there.

A. From the west going east.

Q. Or from the east going west?

A. From the east going west—well of course the crossing watchman could answer that better than I. However, there's a block signal, southeast of Tallmadge Avenue which lights up when there's a train on the circuit which means after it has passed a certain point between Cuyahoga Falls and Tallmadge Avenue.

Q. Well in order to see that he'd have to look—

A. Southeast. (R. 115-116.)

Just as the ancient Roman deity, Janus, alluded to by petitioner at page 9 of his brief, was the creature of myth, the statements by petitioner as to his so-called multiple duties are likewise factually unfounded.

It is apparent from his own testimony that petitioner was not paying any attention to the cars of the passing train on this occasion for he thought it contained about forty-five box cars, although there were actually 80 empty gondola cars in the train, which cars were no higher than 7-8 feet above the rails. Furthermore, there was uncontroverted evidence that the petitioner was not facing the train when he was struck and injured. See the testimony of petitioner (R. 18, 156); Sam Bailey (R. 71); Charles Feathers (R. 90-91); John Martin (R. 99-100); and Raymond Peterson (R. 112).

Respondent had provided petitioner with a red lantern, a green lantern, a white lantern, a shrill whistle and a stop disc for use at the crossing. He had used the whistle and the red lantern to stop the highway traffic on the approach of the train, and he was holding the red and green lanterns in his hands while he was on the crossing before being hit. The "tell-tale" lights in the shanty and atop the

were the highway flasher lights at all street approaches to the crossing. The block signal south of the crossing could be seen by a person standing where petitioner was standing, when the last car of an eastbound train was still 134 feet from the crossing. The evidence conclusively showed that the caboose at the rear of this eastbound freight train, then moving at about 15 miles per hour, was on the crossing or was leaving the crossing at the time the petitioner was struck down by James Ball. Petitioner himself testified that he had seen the caboose when it was about 100 feet south of the crossing, and that he knew there were no other cars behind it (R. 61). By merely looking to the southeast at the block signal, petitioner could have determined whether any approaching westbound train had reached a point 3,455 feet north of the crossing, while at the same time watching the automobiles waiting at Home and Tallmadge Avenues.

Moreover, the petitioner knew that when the rear of an eastbound train passed over an insulated rail joint 75 feet north of the middle of the crossing, the flasher light circuit for an eastbound train would cease operating. Once the caboose of this eastbound train came on the crossing at a speed of about 12-15 miles per hour, petitioner knew that by the simple expedient of waiting about 3-4 seconds, he could determine whether a westbound train was within 2,000 feet north of the crossing, for if, after the eastbound train passed over the insulated rail joint, the flasher lights remained on, he would know that the westbound train had struck the insulated joint on the westbound main 2,000 feet north of the crossing. Petitioner, by facing in a southerly, southwesterly, or even a westerly direction, and by merely looking at the flasher lights, could have determined the presence of a westbound train within the flasher circuit, since not only would he see the reflection of the red

flasher lights, but, also, the white flashing lights through the windows located on the side of the body of each such light.

There can be no question that these protections afforded petitioner were more than adequate.

Petitioner did not testify or otherwise offer any proof that during the three years he had continuously acted as a watchman on the 11 P. M. to 7 A. M. shift at this crossing, either that there had been any occurrence similar to that which resulted in his injury, or that he, or any other watchman, had ever been endangered while performing the duties of a crossing watchman. It is certain that if there had been any such occurrence or if he had been so endangered, such fact would have been made known by him. The absence of any evidence of previous danger or of any prior occurrence, similar or otherwise, is eloquent proof that respondent had no notice, either actual or constructive, that there was any likelihood of injury to petitioner while in the performance of his duties as a crossing watchman. Petitioner, at page 15 of his brief, implies that respondent would blind itself to every day experience. However, once again, he overlooks the fact made so clear by the record in this case, that there simply had been no "experience" of traffic violations by motorists at this crossing. The decision of this Court in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957), quoted by petitioner at page 16 of his brief, is wholly distinguishable from the facts of the case at bar. In the *Ferguson* case, this Court was of the opinion that, on the evidence presented, the jury could conclude that the baker had not been furnished with a safe tool with which to do his work and that it was foreseeable that the baker would attempt to remedy this lack by using a butcher knife to remove the hardened

In both *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), and *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350 (1943) (cited by petitioner at several places in his brief), unlike the instant case, sufficient probative evidence appeared in the record from which the jury could, with reason, draw the inference that the defendants in those cases were negligent. In *Rogers*, there was uncontradicted evidence that petitioner was where he was in furtherance of explicit orders to watch for hot boxes, and there this Court concluded that such evidence, along with other evidence, "supplied ample support for a jury finding that respondent's negligence played a part in the petitioner's injury." 352 U. S. at 503. In *Bailey*, evidence as to the nature of the work and the hazards which it entailed, as well as upon other matters, was "for the jury to weigh and appraise." 319 U. S. at 353. Likewise, in *Wilkerson v. McCarthy*, 336 U. S. 53, 60 (1949) (cited by petitioner at page 10 of his brief), there was a conflict in evidence as to whether, after the erection of chain barriers, only pit employees or employees generally used the permanent board as a walk way. The cases of *Smalls v. Atlantic Coast Line R. Co.*, 348 U. S. 946 (1955) (cited by petitioner at pages 13-14), and *Schultz, Adm'r. v. Pennsylvania R. Co.*, 350 U. S. 523 (1956), (cited in his brief at page 11), have facts wholly dissimilar to those of the instant case.

In *Woods v. New York Central R. Co.*, 222 F. 2d 551 (6th Cir. 1955), a case with facts very similar to the instant case, plaintiff was employed by the defendant railroad as a crossing watchman at the intersection of defendant's double tracks and Main Street in Springfield, Ohio. At 3:00 A. M., upon receiving a signal that a train was approaching, plaintiff started the flasher lights and took

his position in the middle of the street. While blowing his whistle and swinging his lantern to warn traffic of the approaching train, a motorist crashed into plaintiff and thereafter fled the scene. On the trial, the court directed a verdict in favor of defendant; and upon appeal, the Court of Appeals affirmed, holding that there was no evidence of negligence on defendant's part.

And in *Smith v. Baltimore & Ohio R. Co.*, 204 F. 2d 162 (6th Cir. 1953), cert. den., 346 U. S. 838, a case where the employee's death resulted from the collision of a truck with an engine upon which he was riding, the Court of Appeals affirmed the trial court's direction of a verdict for defendant, and held that the record failed to reveal any substantial evidence of negligence on defendant's part which was a proximate cause of the death, and that, therefore, there was no substantial evidence on which the case could have been submitted to the jury on the issue of negligence.

Murray v. Atlantic Coastline R. Co., 218 N. C. 392, 11 S. E. 2d 326 (1940),* was a case where the plaintiff, a trackman, was injured when a motorist crashed into a barricade intended to protect workmen at a crossing. The conditions of the crossing were such that a motorist, in the exercise of ordinary care, would have had sufficient time and space within which to avoid such an accident. The court in the *Murray* case stated that the rule of the ordinary prudent man did not require the railroad company, in the exercise of ordinary care to provide plaintiff a reasonably safe place to work, to anticipate that the driver of an automobile would not see that which was plainly before him or drive with his car so out of control that he could not stop when he saw the barricade or person in the line of travel.

Another case involving a crossing watchman was *Boyd v. Seaboard R. Co.*, 200 N. C. 324, 156 S. E. 507 (1931), cited in the *Murray* case. There the decedent, on the approach of a freight train, went upon the crossing and began flagging traffic with a red lantern. The operator of one automobile, upon seeing the decedent, slowed down, and, as he prepared to stop, another car passed him at a high rate of speed and, without attempting to stop, went onto the crossing and struck the decedent, who was thrown under the train. The court in the *Boyd* case, in sustaining the non-suit of plaintiff, stated:

* * * (I) t is manifest that the unfortunate death of plaintiff's intestate was proximately caused and produced by the negligent and reckless act of a third party, and that such reckless and negligent act was in no wise related to, growing out of, or dependent upon, any omission of duty upon the part of the defendant.

The record of the instant case discloses no act of omission or commission by respondent which could constitute negligence under either of the specifications of alleged negligence submitted to the jury. Furthermore, the record discloses no such act by respondent which could have played any part at all in producing the injuries to petitioner. There was no evidence from which the jury could reasonably or properly conclude or infer that respondent knew, or in the exercise of ordinary care should have known, that James Ball would, in the process of violating five traffic statutes, strike down and injure the petitioner while he was in the performance of his duties as a watchman at this crossing. Accordingly, there was no evidence upon which this case could properly be submitted to a jury on the issue of alleged negligence on respondent's part.

Recent decisions by this Court have underscored the requirement that in cases where the injury is caused or produced by the wrongful act of a third party, such as in the instant case, there must be probative evidence presented upon which a jury can properly infer that such an injury must have been foreseeable by the employer. In *Lillie v. Thompson*, 332 U. S. 459 (1947), the plaintiff, a female telegraph operator, was criminally attacked at her place of work in an isolated part of defendant's yard. She alleged that defendant was negligent in sending her to work in a place defendant *knew* to be unsafe and frequented by dangerous characters. The appellate court had affirmed the trial court's order made prior to any trial that the complaint be dismissed for failure to state a cause of action. This Court granted certiorari and, in reversing and remanding the cause for trial, stated:

We are of the opinion that the allegations in the complaint, *if supported by evidence*, will warrant submission to a jury (emphasis added) 332 U. S. at 461.

And in *Cahill v. New York, N. H. & H. R. Co.*, 350 U. S. 898 (1955), the plaintiff charged that the defendant was negligent in improperly directing him to work in an unsafe place with *knowledge* that the place was unsafe. From a judgment in favor of plaintiff, the defendant appealed to the Court of Appeals contending: (1) insufficiency of evidence to permit submission of the case to the jury, and (2) erroneous admission of evidence of prior accidents at the scene of Cahill's injury which had been offered to show negligence by the railroad in failing to warn him of dangers such as had brought about those prior accidents. The Court of Appeals reversed the judgment on the first ground, expressly stating that it found no necessity in passing on

Though this Court granted certiorari and reversed the Court of Appeals, thereby reinstating the judgment of the trial court, this decision was later recalled and the case remanded to the Court of Appeals for its ruling on the question of admissibility of evidence of prior accidents. *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183 (1956). Upon its consideration of this question, pursuant to the order of remand, the Court of Appeals, in *Cahill v. New York, N. H. & H. R. Co.*, 236 F. 2d 410 (2d Cir. 1956), was of the opinion that a list of nine prior automobile-train accidents, related by the defendant in answer to an interrogatory propounded by plaintiff, was admissible for the purpose of supporting plaintiff's claim that the defendant knew or should have known that plaintiff's place of work was unsafe because of his inexperience and the claimed inadequacy of instruction as to his duties. The Court of Appeals then went on to state that the admission of this list, even if assumed to be erroneous, would not justify reversal, since two employees of the defendant had testified without objection that automobile-train collisions had occurred in this area in the past, and one of these employees stated that flagmen had been killed there.

In the instant case, unlike the *Lillie* and *Cahill* cases, petitioner neither alleged nor offered any evidence which could even suggest that respondent knew or, in the exercise of ordinary care, should have known that petitioner was or might be in a situation of danger while performing his duties at the "Bettes Corners" crossing.

The *Lillie* case and the *Cahill* case are easily distinguishable from the case at bar. Neither case lends support to petitioner's contentions. In the *Lillie* case, this Court recognized that the allegation of defendant's knowledge

by dangerous characters, must be supported by probative evidence. In the *Cahill* case, this Court remanded that cause for a decision on the question of admissibility of evidence of prior accidents, again recognizing that before a defendant can be found liable under the Federal Employers' Liability Act, there must be admissible evidence presented upon which the jury can determine that danger to the employee was foreseen or foreseeable in the exercise of ordinary care.

Petitioner, at page 14 of his brief, attempts to supply by argument that which does not exist in the record. Petitioner, here, was not inexperienced or untrained as was the claim of plaintiff in the *Cahill* case. Petitioner, Carl Inman, had been employed as a crossing watchman by respondent for about seven years prior to this accident, and he had worked on the 11:00 P. M. to 7:00 A. M. shift at the "Bettes Corners" crossing for about 3 years. (R. 12.) Not only was he familiar with the Company rules and the duties required of him (R. 40-42), he was thoroughly familiar with the flasher light and block system circuits at this crossing (R. 43-45). Standing where he testified he was in the center of Tallmadge Avenue, 2-3 feet west of the westbound track, he was about 50 feet west of the point of intersection of these two streets and, as clearly shown by Joint Exhibit A (R. 160, 234), was outside and west of the intersection, his position being about 40 feet west of the extended westerly line of Home Avenue. Rather than having his back to northbound Home Avenue traffic, petitioner, being about 140 feet from the stop sign located near the flasher light on the east side of Home Avenue, was in a position where, even if facing in an easterly direction, he could glance to his right and observe such traffic while at the same time looking at the block signal and flasher lights south of the crossing.

CONCLUSION.

As shown by the record of the instant case, there was no probative evidence of any character which would even suggest that defendant knew or, in the exercise of ordinary care, should have known that there was even the slightest possibility that petitioner would be injured in the manner that he was injured. The force which solely caused or produced petitioner's injury was an automobile operated by a drunken driver. James Ball, in violation of five traffic statutes. There can be no duty imposed upon an employer in a Federal Employers' Liability Act case, or in any other action based upon negligence, to provide protection against a force which is both unforeseen and unforeseeable. Before negligence on respondent's part can be found to exist, the breach of a duty owed by respondent to petitioner must be shown, for respondent was not required to insure the safety of petitioner while in the performance of his duties at this crossing.

The Court of Appeals, in reversing the judgment of the trial court and entering final judgment for respondent neither erred in its application of the principles of law enunciated by this Court, nor deprived petitioner of any of his constitutionally protected rights.

The decision of the Court of Appeals in this case is not based upon any technical argument as to proximate cause. Rather, it is grounded on the complete absence in the record of any evidence of negligence on the part of respondent. In reaching its decision the Court of Appeals has not weighed the evidence; it has simply looked at the record in accordance with the mandate of this Court in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957), and found that the proofs do not justify the conclusion that there was any negligence on the part of the employer which played any part in producing the injuries to petitioner.

The decision of the Court of Appeals is clearly correct and is in complete conformity with the applicable decisions of this Court. The judgment of the Court of Appeals, Ninth Judicial District of Ohio, should be affirmed.

Respectfully submitted,

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JOHN L. ROGERS, JR.,

Counsel for Respondent.

APPENDIX.**Statutes of the State of Ohio.**

Ohio Gen. Code Sec. 6307-20 (now Ohio Rev. Code Sec. 4511.20):

Reckless operation of vehicles.

No person shall operate a vehicle, trackless trolley or street car without due regard for the safety and rights of pedestrians and drivers and occupants of all other vehicles, trackless trolleys and street cars, and so as to endanger the life, limb or property of any person while in the lawful use of the streets or highways.

Ohio Gen. Code Sec. 6307-30 (now Ohio Rev. Code Sec. 4511.30):

Driving to the left of center line forbidden, when.

(a) No vehicle or trackless trolley shall, in overtaking and passing traffic, or at any other time, be driven to the left of the center or center line of the roadway under the following conditions:

* * *

3. When approaching within one hundred feet of or traversing any intersection or railroad grade crossing, unless compliance with this section is impossible because of insufficient roadway space.

Ohio Gen. Code Sec. 6307-35 (now Ohio Rev. Code Sec. 4511.36):

Rules governing turns at intersections.

The driver of a vehicle intending to turn at an intersection shall do so as follows:

* * *

(b) At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after enter-

ing the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

* * *

Ohio Gen. Code Sec. 6307-38 (now Ohio Rev. Code Sec. 4511.39):

Appropriate signal to be given when turning or changing speed; mechanical signal device.

(a) No person shall turn a vehicle or trackless trolley from a direct course upon a highway unless and until such person shall have exercised due care to ascertain that such movement can be made with reasonable safety to other users of the highway and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the event any traffic may be affected by such movement.

* * *

Ohio Gen. Code Sec. 6307-42 (now Ohio Rev. Code Sec. 4511.43):

Right-of-way at through highway; stop signs.

(a) The operator of a vehicle, intending to enter a through highway, shall yield the right of way to all other vehicles, street cars or trackless trolleys on said through highway.

(b) The operator of a vehicle, street car or trackless trolley shall stop in obedience to a stop sign at an intersection where a stop sign is erected and shall yield the right of way to all other vehicles, street cars or trackless trolleys not so obliged to stop.

In the Supreme Court of the United States

OCTOBER TERM, 1959.

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CARL C. INMAN,

Petitioner,

vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OHIO.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Respondent makes a new contention in its brief, and now argues to this Court that there was but one intersection of Tallmadge Avenue and Home Avenue (Respondent's brief, page 4); and states that Petitioner was standing near the center line of Tallmadge Avenue about 40 feet west of the westerly limit of the intersection when hit (Respondent's brief, page 6). This is not the fact. By reason of the angle of the railroad tracks across the intersection, there are two separate intersections of Home Avenue into Tallmadge Avenue. One intersection of the highways is located east of the tracks and the other intersection is located west of the tracks. (Joint Ex. A; R. 234. See also Petitioner's Exhibits 5, 7 and 11. R. 214-216.)

The opinion of the Court of Appeals says that Petitioner was struck by an automobile "being driven in a

northeasterly direction on Home Avenue and making a left turn into Tallmadge Avenue at said *intersection*." (R. 249.)

It is respectfully submitted that from the clear import of this language of the Court of Appeals and from the facts of record, respondent's new position that Home Avenue does not also intersect Tallmadge Avenue west of the railroad tracks and that petitioner, when struck, was standing 40 feet west of the westerly limit of the intersection is patently erroneous. However, in view of the most unusual character of the multiple street intersections at this crossing the confusion is understandable.

We are unable to understand clearly the position of respondent, for it seems to take contrary positions on this question. When it suits its purpose it contends petitioner was struck at the intersection of Home Avenue and Tallmadge. (See Respondent's written requests to charge before argument Nos. 5 and 8, R. 192-193.)

Respondent further claims "There was not a syllable of evidence offered into the record which would even suggest that any motorist proceeding north on Home Avenue, other than the driver, James Ball, had ever made such a left turn in that area" (Respondent's brief, page 10).

Witness Sam Bailey testified positively that he not only saw the automobile strike Mr. Inman but also that he had seen other cars make just such a left turn at that same intersection on a lot of other occasions and his testimony on this subject may be found (R. 68) and in petitioner's brief on the merits at page 6.

We submit that the testimony of Sam Bailey completely destroys the railroads' claim of lack of evidence on this subject.

The Duties Petitioner Was Required to Perform and the Circumstances Under Which He Was Required to Work Made Injury to Him Almost a Certainty. At Least, Such an Eventuality Was Clearly Foresecable.

Certainly there is no merit in respondent's claim that petitioner did not testify that he had any duty other than to warn highway traffic of approaching trains. During the time when the train was occupying the crossing which was 5 to 10 minutes (R. 98), Mr. Inman testified that he had received a report that the Detroit Steel train was due out of Ravenna and that *it was his duty* to look to the north for that train before he could clear the crossing to let traffic through. His testimony follows (R. 17):

“Q. Which way did you face then after the train started to pull across the crossing?

A. After the crossing was blocked you have reference to?

Q. Yes.

A. I looked at the train, I looked anyway, that time, until I could see where the caboose was, *then I had to look north towards Cuyahoga Falls* to see if I could get a reflection, that was looking over my left shoulder.

Q. What was your reason for looking toward Cuyahoga Falls?

A. One to see if there was a reflection of a head-light coming around the curve. I couldn't see the light down at Evans Avenue.

Q. Why couldn't you?

A. The eastbound train was blocking it.”

And see also the testimony of Elmer Fox, signal maintainer for respondent, with reference to the duties of petitioner (R. 126):

“Q. Is that his duty to see if there's a train approaching from the other way?

A. Yes, sir.

Q. He's at a more advantageous spot if he goes to the west side of the track?

A. That's right.

Q. That way he can look to the left or north or look to the south at that light when the train had passed a certain point where he could see it?

A. Yes.

Q. And it is his duty, until the train which is going east passes the crossing, to stay there to see if there's another train coming that comes into the circuit?

A. Yes."

The fact that respondent ignores this testimony only makes it stand out in bold relief.

Respondent's contention that there was no evidence upon which this case could properly be submitted to a jury ignores the evidence in the record. The railroad crossing involved in this case possessed features of peculiar and unusual hazard. This was an ultimate fact well established by the record. Standing in the center of a busy highway, entails some risk to a person, but standing in the intersection of two busy highways, in the night season, and in such a position that the person is unable to face traffic entails a *greater risk*.

The only reason respondent did not foresee or anticipate the likelihood of petitioner's injury is that it failed to give any consideration to petitioner's safety. Had the respondent given any thought to the matter,

- (1) It would not have required *one* flagman to flag traffic in all directions at this particular crossing and then
- (2) have him stand directly within the intersection of two busy highways, for a period of 5 to 10 minutes in the night season, and require him to

look for other trains approaching the crossing and to watch for "hot boxes" on the train moving over the crossing with his back to traffic.

- (3) It would have permitted him to face traffic to contend with the dangers to which he was exposed.

The Issue of Ball's Negligence.

Respondent expends several pages of its brief on the negligence of Ball and devotes about the same space to the traffic laws governing motorists in the operation of motor vehicles. We deal with this issue because we believe it is a false issue, not properly a part of this case, which needlessly confuses and obscures the real issue between petitioner and the respondent railroad. The Court is not here concerned with a criminal prosecution against Ball for violation of the traffic law. This is simply a negligence case against the railroad.

In *Lillie v. Thompson*, 332 U. S. 459, the Court said at page 462:

"That the foreseeable danger was from intentional or criminal misconduct is irrelevant."

This Court in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957) said at pages 506, 507:

"Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the *single inquiry* whether, with reason, the conclusion may be drawn that negligence of the *employer* played any part at all in the injury or death." * * *

"It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, *attribute the result to other causes.*"

Under the Court's charge (R. 203-5), the jury verdict is a finding that the respondent could have anticipated or

foreseen that petitioner would be injured by just such an occurrence. We still practice law under a jury system. It was not for defense counsel or the Court of Appeals to say that respondent could *not* foresee or anticipate the manner in which petitioner was injured *as a matter of law*.

Assuming all respondent says about Ball is true, the jury, nevertheless, found that respondent was negligent.

In answer to respondents' claim that there was no proof of similar occurrences resulting in injury to any other watchman at this crossing we cite the case of *Arnold v. Panhandle and Santa Fe Ry.*, 77 S. Ct. 840 (1957), reversing 283 S. W. 2d 303 (Tex. Civ. App. 1955). Here the railroad's car inspector was working in a ten foot passageway adjoining the tracks where he was injured by a third party's truck which backed into him. There was a verdict for petitioner which was reversed by the Texas Court of Civil Appeals. *There was no evidence of any prior similar occurrence.* The Supreme Court in reversing pointed out that there was testimony justifying the inference that the passageway as used was not a safe place to work.

In the case of *Cornec et al. v. Baltimore & Ohio R. Co.*, 48 F. (2d) 497 the Court said at page 501:

"Negligent methods of operation do not always or even generally result in disaster. The inquiry is, not whether a method of operation has been used without disastrous results, but whether it is of such a character that danger of injury is reasonably to be apprehended from its use. Where the element of danger is present, successful operation is to be deemed 'fortunate rather than prudent.'"

CONCLUSION.

For the reasons given in petitioner's brief and in this reply brief, petitioner again respectfully submits that the judgment of the Court of Appeals for Summit County, Ohio, should be reversed with directions that the judgments of the trial court be affirmed.

Respectfully submitted,

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